No. 2573

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

R. C. BELL, MARY A. BELL and AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,

Appellants,

vs.

MARY E. C. MORLEY and FRED MORLEY,

Appellees.

TRANSCRIPT OF RECORD

Upon Appeal from the United States District Court for the Western District of Washington, Southern Division

The Bell Press, Printers

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Names and Addresses of Attorneys.

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Platt Building, Portland, Oregon,
Attorneys for the Appellees.

In the District Court of the United States for the Western District of Washington, Southern Division.

MARY E. C. MORLEY and
FRED MORLEY,
Complainants,

vs.

R. C. BELL and
MARY A. BELL,
Defendants.

COMPLAINT IN EQUITY.

To the Honorable Judges of the District Court of the United States in and for the Western District of Washington, Southern Division:

Come now the complainants above named and, complaining of the defendants, for cause of suit, allege:

I.

That at all times herein mentioned complainants were and still are wife and husband and both citizens, residents, and inhabitants of the state of Michigan, residing at Lapeer in said state.

II.

That at all times herein mentioned defendants were and still are husband and wife and both citizens, residents, and inhabitants of the state of Oregon, residing in the city of Portland, said state.

III.

That this is a suit between citizens of different states, to-wit: between complainants, citizens, residents, and inhabitants of the state of Michigan, and defendants, citizens, residents, and inhabitants of the state of Oregon, and is a suit to foreclose a mortgage in favor of the complainants and executed and delivered to the complainants by the defendants upon real property within the Western District of Washington, Southern Division.

IV.

That on the 22nd day of April, 1912, the defendant, R. C. Bell, for a valuable consideration, executed and delivered to complainants his promissory note in writing, of which the following, in words, letters, and figures, is substantially a copy, to-wit:

"$5625.00. Portland, Oregon, April 22nd, 1912.

On or before twelve (12) months after date, I promise to pay to the order of Mary E. C. Morley and Fred Morley Five thousand six hundred twenty-five Dollars for value received, with interest from date, payable at maturity at the rate of six (6%) per cent per annum, until paid, principal and interest payable in U. S. Gold Coin, at Lumbermen's National Bank of Portland, Oregon; and in case suit or action is instituted to collect this note or any portion thereof, I promise to pay such additional sum of money as the Court may adjudge reasonable as attorney's fees in such suit or action.

(Sd.) R. C. BELL."

V.

That no part of said indebtedness has been paid,

either principal or interest, except $120.93 account of interest thereon paid May 26th, 1913, and there is now due and owing thereon from the defendant R. C. Bell to the complainants the full sum of five thousand six hundred twenty-five ($5625), with interest thereon at the contract rate of six per cent per annum from April 22, 1912, less credit of $120.93 account of interest thereon paid May 26th, 1913.

VI.

That, in and by the terms of said note, the defendant R. C. Bell promised to pay the complainants, in case suit were instituted to collect said note or any portion thereof, such additional sum of money as the court should adjudge reasonable as attorney's fees in such suit, and in that regard complainants allege that the sum of seven hundred fifty dollars ($750) is a reasonable sum to be allowed complainants as attorney's fees in this suit.

VII.

That, at the time of the execution of said note, and to secure the payment thereof, both principal, interest, and attorney's fees, the defendants executed and delivered to the complainants their indenture of mortgage, in writing, of which the following exclusive of the names of witnesses and the details of the acknowledgement, is, in words, letters, and figures, substantially a copy, to-wit:

"THIS INDENTURE made this 22nd day of April, 1912, by and between R. C. Bell and Mary A. Bell, his wife, of the City of Portland, County of Multnomah, State of Oregon, here-

inafter called the parties of the first part, and Mary E. C. Morley and Fred Morley, her husband, parties of the second part, of Lapeer, Michigan,

WITNESSETH:

That Whereas the parties of the second part have loaned to the parties of the first part the full sum of twenty-two thousand five hundred ($22,500) dollars, which sum the said parties of the first part agree to repay on or before twelve months after this date, and to pay interest thereon at the rate of six (6%) per cent per annum from this date, until paid; and also to pay all taxes and assessments which may be assessed or levied to or against the parties of the second part, or assigns, on account of such loan. All according to the terms of four (4) promissory notes given therefor, of which the following is a copy of the first, to-wit:

Portland, Oregon, April 22nd, 1912.

$5625.00

On or before three (3) months after date, I promise to pay to the order of Mary E. C. Morley and Fred Morley five thousand six hundred twenty-five dollars, for value received, with interest from date, payable at maturity at the rate of six (6%) per cent per annum, until paid, principal and interest payable in U. S. Gold Coin, at Lumbermens National Bank of Portland, Oregon; and in case suit or action is instituted to collect this note, or any portion thereof, I promise to pay such additional sum of money as the Court may adjudge reasonable as attorney's fees in such suit or action.

R. C. BELL

The other three notes being of the same tenor, date and amount, except that they fall due respectively six (6), nine (9) and twelve (12) months from their date.

Now, therefore, in consideration of the said loan, and for the purpose of securing the payment of the said several sums of money named in said notes, and the faithful performance of all the covenants herein contained, the parties of the first part do hereby grant, bargain, sell and convey unto the said parties of the second part, their heirs and assigns forever, all of that certain real estate situate in Wahkiakum County, State of Washington, and described as follows, to wit:—

(a) Lots two (2), three (3) and four (4), and the southeast quarter of the northwest quarter, and the east half of the southwest quarter, and the southeast quarter of section nineteen (19); the west half of the southwest quarter of section twenty (20); and the northwest quarter of the northwest quarter of section twenty-nine (29); all in township ten (10) north, range seven (7) west of the Willamette Meridian;

(b) Also all the timber standing, growing, lying and being on the southeast quarter of the southeast quarter of section twenty four (24); in township ten (10) north, range eight (8) west of the Willamette Meridian, together with the right to remove said timber at any time within twenty(20) years from the eighth day of August, 1906, and together with the right to build, operate and maintain railroads, skidroads, telephone lines, or other devices,

over and across said described land and necessary or convenient to remove said timber therefrom.

(c) Also that certain right of way conveyed by G. K. Durrah and Clara Durrah, his wife, under date of January 15th, 1912, for fifteen (15) years, in language following, to wit:—

'A right of way twelve feet wide, over our land for a railroad, commencing about five hundred feet above the County Road on bank of Grays River, running from this starting point and curving until a straight line can be had along the fence; thence straight up the fence line, until the point of crossing the County Road into the lands of W. C. Kessell is reached, at which point a suitable curve will have to be made to make the County Road crossing. We also grant a privilege of using the River Bank as a Roll Way.'

(d) Also a right of way granted by W. C. Kessell and Mary Kessell, his wife, under date of January 15th, 1912, for ten (10) years, in language following, to-wit:—

'A right of way for a railroad over our land, situated near Grays River, Washington. Width of right of way over said ground fifteen feet. Work shall begin within sixty days from date of this lease. The grantee may go over any portion of the land desired, and agrees to remove any gravel that may be used for a roadbed through the hay field.'

(e) Also a right of way granted by Jacob W. Haynes and L. C. Haynes, his wife, under date of January 16th, 1912, for ten (10) years, in language following to wit:—

'A right of way for a logging railroad over the following described land, SW¼ of the NE ¼ of section 19, T 10 R. 7. Work to start within sixty days from date. Logging road to follow left hand side along foot hill.'

Together with the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining, to have and to hold unto the parties of the second part, their heirs and assigns forever.

But as a mortgage to secure the payment of several sums of money specified in said notes before mentioned, and the performance of the covenants and conditions herein contained.

And the parties of the first part covenant that said R. C. Bell is the owner in fee simple of said real estate.

That it is free from emcumbrances, and that they will pay all of said sums of money, the principal and interest, specified in said notes, at the times designated therein, and all the taxes and assessments which may be assessed or levied against the parties of the second part, or assigns, on account of said notes or mortgage and all taxes and assessments which may be lawfully levied upon or against said land when the same become due and payable, and not later than ten days before the same become delinquent.

And it is expressly agreed and provided by and between the parties hereto, that if said mortgagors shall fail or neglect to pay said taxes and assessments as above provided, the mortgagees may pay such taxes and the taxes so paid the parties of the first part agree to

repay, and the said sums of money shall at once become due and bear interest at the rate of six (6%) per cent per annum until repaid. And the same shall be repaid at the same time and with the first installment of interest which shall become due thereafter, and shall be a part of the debt secured by this mortgage and a lien on said land.

It is expressly agreed and provided by and between the parties hereto, that if the mortgagors shall desire to commence to remove any of the timber from the above described lands before the final payment of the said notes secured hereby, then and in that event the mortgagors will, on or before the tenth day of each calendar month, make a report in writing to the mortgagees, which shall be a true and correct statement of all timber cut from said lands during the next preceding calendar month, and shall contemporaneously with said report pay to the mortgagees, to be applied upon the first of said notes thereafter falling due, two dollars and fifty cents ($2.50) per thousand feet for each and all of said timber cut during the said preceding month, as shown in said reports. If the mortgagees shall become dissatisfied at any time with said reports, they may employ, at the expense of the mortgagors, which said expense shall be secured by this indenture and fall due at the next interest date thereafter upon any one of said mortgage notes, a suitable party to go upon said described lands, or any place where the logs derived from the said timber cut as aforesaid, may be located, for the purpose of scaling, estimating and checking the same, and if it shall appear that said re-

ports, so made by the mortgagors, or any one of them, are not correct, the mortgagees, at their option, may, by notice in writing served upon the morgagors, prohibit further cutting and removing of any timber from said described lands, and the same shall thereupon cease, until all the balance evidenced by the said notes above described shall have been paid in full.

The mortgagors further agree that they will commence and diligently carry on the construction of a logging road or logging railroad, so that the timber, when cut from the above described lands and ready for market, can be transported therefrom to the said dumping ground on the bank of Grays River, and in said construction they will fully pay all labor and material therefor, and allow no charge or claim to become fastened thereon, which shall be prior or superior to the lien of this mortgage.

It is especially agreed and provided by and between the parties hereto that if the mortgagors shall fail to make any payments hereunder, and in said notes provided, either principal or interest, upon said notes, or for timber cut as hereinbefore provided, whenever the same shall fall due, or shall permit any lien for labor or material for the construction of said logging road or railroad to become a charge or lien upon the said premises above described, or the said timber, or said rights of way, whether the same shall be prior or inferior to the lien of this mortgage, then the whole amount of the principal unpaid, as evidenced by the said notes, together with all interest accrued thereon, shall, at the option of the mortgagees, on demand, become due and payable forthwith.

Now the payment of the said principal, interest and taxes, as above provided, will render this conveyance void.

But it is expressly provided that time and the exact performance of all the conditions hereof is of the essence of this contract, and in case default be made in the payment of any of said sums of money when due and payable, as above provided, either of the principal or any installment of interest, or any portion thereof, or of any of the said taxes, or in the performance of any of the covenants or conditions herein provided on the part of the mortgagors, then the whole of the principal sum and the interest accrued at the time default is made, and all taxes which the holder of said note shall have paid or become liable to pay, shall at the option of such holder become due and payable and this mortgage may be foreclosed at any time thereafter.

And it is also expressly agreed between said parties that if any suit is instituted to effect such foreclosure, by reason of any such default, the party to such suit holding this mortgage may recover therein as attorney's fees such sum as the court may adjudge reasonable, in addition to the costs and disbursements allowed by the code of civil procedure, and said attorney's fees and costs shall be secured by this mortgage.

In witness whereof, the parties of the first part have hereunto set their hands and seals, the day and year first above written.

Signed, sealed, and de-
livered in the presence

of us as witnesses:—

.....

.....

R. C. BELL (Seal)
MARY A. BELL (Seal)

State of Oregon }
County of Multnomah } ss:

Be it remembered That on this..... day of April, 1912, before me, the undersigned, a Notary Public in and for said county and state, personally appeared the within named R. C. Bell, and Mary A. Bell, his wife, who are known to me to be the identical individuals named and described in and who executed the within and foregoing instrument and acknowledged to me that they executed the same freely and voluntarily.

In witness whereof, I have hereunto set my hand and notarial seal the day and year first in this certificate above written.

_____

Notary Public in and for Oregon.
My Commission expires:—
_____"

VIII.

That the said indenture of mortgage was so executed, witnessed and acknowledged as to be entitled to record, and was thereafter and on the 27th day of July, 1912, duly recorded in the records of mortgages of Wahkiakum county, Washington, in Volume 1, page 88, where at all times since it has remained of record, wholly unsatisfied, except that

all indeptedness therein described has been paid except that sought to be recovered in this suit.

IX.

That there has been a breach in the conditions of said mortgage, not only in the non-payment of the said promissory note at the maturity thereof, both principal and interest, but that the clause of said mortgage reading as follows:—

> "It is expressly agreed and provided by and between the parties hereto that if the mortgagors shall desire to commence to remove any of the timber from the above described lands before the final payment of the said notes secured hereby, then and in that event the mortgagors will, on or before the tenth day of each calendar month make a report in writing to the mortgagees, which shall be a true and correct statement of all timber cut from said lands during the next preceding calendar month, and shall contemporaneously with said report pay to the mortgagees, to be applied upon the first of said notes thereafter falling due, two dollars and fifty cents ($2.50) per thousand feet for each and all of said timber cut during the said preceding month, as shown in said report."

has not been complied with by the defendants, or either of them; that the defendants have cut and now have on said lands in the Columbia River, and adjacent thereto within said Wahkiakum county, Western District of Washington, Southern Division, more than 1,500,000 feet board measure of the timber cut from said land, cut into saw logs, which is in equity covered by the lien of said mortgage and which the defendants, unless restrained by this

honorable court will remove from the jurisdiction of this court and from the lien of said mortgage, to the great and irreparable damage and injury of the complainants.

X.

That said defendants, mortgagors as aforesaid, have not, on or before the tenth day of any calendar month since commencing the cutting of said timber, made a report in writing, containing a true and correct statement of the timber cut from said lands during the next preceding calendar month, and have not, contemporaneously with said report, or at all, paid to the mortgagees for application upon said note the sum of two dollars and fifty cents ($2.50) per thousand feet, or any sum, for each and all, or any of said timber cut during said preceding month, but have by extravagant, wasteful and non-lumberlike methods removed from said lands, without said report or payments, the bulk of the merchantable timber thereon, in violation of equity and good conscience, and the provisions of said mortgage thereto relating; that the complainants have made seasonable demands for said reports and said payments, each and all of which the defendants have failed and refused to give or comply with; that the land, and interest therein, described in said mortgage apart from said sawlogs, is not worth the amount of said note, and unless said saw logs are preserved within the jurisdiction and control of this court, to respond to the decree of this court, and the demands of the judgment hereinafter demanded, complainants will be deprived of the benefits of said

mortgage, and of their said lien upon said land, timber and saw logs; that the said million and one half feet, board measure, of timber cut from said lands, as aforesaid, has been cut more than one month prior to the tenth day of June, 1913, and no report or payment therefor, as provided in said contract has been made, although the same has been demanded by the complainants from the defendants; that practically all of the merchantable timber on said land has been prior hereto cut and removed by the defendants from said lands without the payment of said note.

X-½

That there has been a further breach in the conditions of said mortgage in the following:—

Said mortgage provides:—

> "If the mortgagees shall become dissatisfied at any time with said reports, they may employ, at the expense of the mortgagors, which said expense shall be secured by this indenture and fall due at the next interest date thereafter upon any one of said mortgage notes, a suitable party to go upon said described lands or any place where the logs derived from said timber cut as aforesaid may be located, for the purpose of scaling, estimating and checking the same, and if it shall appear that said reports, so made by the mortgagors, or any one of them, are not correct, the mortgagees, at their option, may, by notice in writing served upon the mortgagors, prohibit further cutting and removing of any timber from said described lands, and the same shall thereupon cease, until all the balance

evidenced by the said note above described shall have been paid in full."

That the complainants (said mortgagees) became dissatisfied with said reports required under the provisions of said mortgage, and sent a suitable party for the purpose of checking up, scaling and estimating the timber cnt, and having ascertained therefrom that the said reports were not correct the complainants (said mortgagees) upon the 11th day of June, 1913, by a notice in writing served upon the defendants (said mortgagors) prohibited them from cutting and removing of any timber from said described lands until all of the balance evidenced by said note above described should have been paid in full; that notwithstanding said notice, the defendants, their servants, agents, employees and representatives, are now about to remove said saw logs, and the whole thereof, from the jurisdiction of this court, as hereinafter more particularly set forth.

XI.

That complainants are informed and believe, and therefore allege to be a fact, that defendants, and neither of them, are financially responsible over and beyond the said mortgaged property, and that they have not property or assets sufficient to meet the demands of the judgment hereinafter claimed herein, except upon the said land, timber, interest in land, and saw logs sought to be foreclosed herein, and that if the said saw logs, or any part thereof, are taken out of the jurisdiction of

this court, the complainants will be wholly remediless in the premises.

XII.

That the defendants, their agents, servants, employees and representatives are now engaged in gathering together and rafting the said saw logs and will as soon as said rafting has been completed, remove the same and the whole thereof from the jurisdiction of this court. That sundry agents, servants and representatives of the defendants are in the physical charge of the said operations, and their names are to the complainants at this time unknown, and it is necessary that they, and each of them, be immediately restrained, as well as the defendants, from removing or attempting to remove said saw logs from the jurisdiction of this court. That it is impossible to give such agents, servants and representatives of the defendants, and the defendants herein, notice of the pendancy of this suit prior to the application for a temporary restraining order, and if the defendants, or either of them, or their agents, servants and representatives, had notice of the pendency of this suit, and of the application for a temporary restraining order, they, and each of them, would forthwith proceed to remove said saw logs, and each and every part thereof, from the jurisdiction of this court, to the great and irreparable damages of the complainants.

XIII.

That no suit or action is pending or has been

brought by the complainants for the collection of said indebtedness, or any part thereof, and the amount involved exceeds the sum of three thousand dollars, exclusive of interest and costs.

XIV.

That plaintiffs have no plain, adequate, or speedy remedy at law, but only in equity.

WHEREFORE, complainants pray for a decree against the defendants in manner and form following to wit:—

First:— For an immediate, temporary restraining order, and that upon order to show cause, said temporary restraining order become an injunction during the pendency of this suit, enjoining the defendants, and each of them, their agents, servants, employees and representatives, from selling, conveying, incumbering, or removing from the said county of Wahkiakum, in the said Western Division of Washington, Southern Division, the said saw logs, or any of them.

Second:— For a judgment against the defendant, R. C. Bell, for the sum of five thousand six hundred twenty five dollars ($5625), with interest thereon at the contract rate of six per cent per annum from April 22, 1912, less credit of $120.93 account of interest thereon paid May 26th, 1913, the further sum of seven hundred fifty dollars, attorney's fees, and their costs and disbursements herein.

Third:—That the defendants, and each of them, be foreclosed of and from all right, title and interest in and to said mortgaged real property described in

said mortgage and the said saw logs and each and every part thereof.

Fourth:— That the said real and personal property be sold as upon execution at law, and that the complainants be empowered to become a purchaser thereof.

Fifth:— That upon final decree the said temporary restraining order be made perpetual.

Sixth:—That from the proceeds of said sale of said mortgaged property and the said saw logs, to which the lien of said mortgage extends, there be paid:—

(a) The costs of said sale;

(b) The costs of this suit;

(c) The said attorney's fees;

(d) The amount of principal and interest found due the complainants herein.

Seventh:—That if, from the proceeds of said sale, there shall be any overplus, the same shall be paid the defendants.

Eighth:—That, if there be a deficiency arising from said sale, judgment shall be docketed therefor against the defendant R. C. Bell.

Ninth:— That complainants have such other, further and different relief as shall seem proper to a court of equity.

Tenth:— And to the ends aforesaid, may it please your Honors to grant unto the complainants the right of subpoena in chancery according to the uses and practises of this court, directed to the said defendants, and each of them, requiring them, and each of them, to appear in court on a day certain,

therein to be named, and under certain penalty to be therein stated, and then and there to answer (but not under oath, said answer under oath being hereby expressly waived) all and singular the premises and to stand to, perform, and abide by such orders, directions and decree as may be made against them in the premises, and as shall seem meet and agreeable to equity and good conscience, and your complainants, as in duty bound will ever pray.

MARY E. C. MORLEY,
FRED MORLEY,
By PLATT & PLATT & J. O. BAILEY,
Their Solicitors.

PLATT & PLATT, J. O. BAILEY,
Solicitors for Complainants.
ROBERT TREAT PLATT,
Of Counsel.

"Filed U. S. District Court, Western District of Washington, July 7, 1913 By Frank L. Crosby, Clerk, F. M. Harshberger, Deputy."

UNITED STATES OF AMERICA

In the District Court of the United States for the Western District of Washington.

(*In Equity*)

THE PRESIDENT OF THE UNITED STATES OF AMERICA, To R. C. BELL, and MARY A. BELL,

GREETING:

You Are Hereby Commanded, That you be and appear in said District Court of the United States aforesaid, at the Court Room of said Court, in the city of Tacoma, on the 28th day of July, 1913, to

answer a Bill of Complaint filed against you in said Court by

MARY E. C. MORLEY
and
FRED MORLEY

and to do and receive what the Court shall have considered in that behalf. And this you are not to omit, under the penalty of Five Thousand Dollars. WITNESS the Honorable EDWARD E. CUSH-
(Seal) MAN, Judge of said Court, and the seal thereof, at Tacoma, Washington, this 7th day of July, 1913.
FRANK L. CROSBY, Clerk.
By E. C. ELLINGTON, Deputy Clerk.

Memorandum Pursuant to Rule 12, Supreme Court, U. S.

YOU ARE HEREBY REQUIRED to enter your appearance in the above mentioned suit on or before twenty days after service hereof next at the Clerk's office of said Court, pursuant to said Bill; otherwise the said Bill will be taken pro confesso.
(Seal) FRANK L. CROSBY, Clerk.
By E. C. ELLINGTON, Deputy Clerk.

Marshal's Return on Subpoena.

UNITED STATES OF AMERICA,
WESTERN
DISTRICT OF WASHINGTON
ss.

I HEREBY CERTIFY that I have served the within writ by delivering to and leaving a true copy thereof with R. C. Bell at Deep River, Wn., and on

Norman Kent, person in possession of mortgaged property, as within I am directed.

JOSEPH R. H. JACOBY,
United States Marshal,
By HARRY A. WHITE,
Deputy.

July 14th, 1913.
Fees: $15.22.

Answer.

Served on Platt & Platt, 8-18-13.
R. T. PLATT.

To the Honorable Judges of the District Court of the United States, in and for the Western District of Washington, Southern Division:

Come now the defendants above named and for answer to the complaint of plaintiffs herein,

I.

Deny that there has been any breach in the condition of the mortgage set forth and described in the complaint herein in the particulars alleged in Paragraph IX. of Plaintiff's complaint, and deny that the defendants or either of them have failed to perform all and several the terms and conditions of that clause of the mortgage set forth in said Paragraph IX.; and these defendants further deny that at the time of the commencement of the suit, or at any time subsequent thereto, the defendants had or have cut, or had or now have upon said lands in the Columbia River or adjacent thereto, more than One Million and a half feet, board measure, of timber from said land, cut into saw-logs, or that they had on hand of timber from said land, cut into

saw-logs at the time of the commencement of the suit, more than Seven Hundred and Fifty Thousand feet.

II.

As to the allegations of Paragraph X. of plaintiff's complaint, defendants allege that during all of the times referred to in the complaint, and particularly at all times since commencing the cutting of timber on the real property described in the complaint, they have made regular reports in writing, substantially in accordance with the terms of said mortgage, containing true and correct statements of the timber cut from said lands, and these defendants particularly allege that they have given and complied with all demands of the complainants for reports, and that of the sum and amounts secured by the mortgage referred to and described in the complaint, the defendants paid the plaintiff Sixteen Thousand Eight Hundred Seventy-five Dollars ($16,875), together with accrued interest thereon in advance of the time when such sum would have been due and payable for timber cut from the premises, at Two Dollars and Fifty Cents ($2.50) per thousand, according to the clause of the mortgage referred to in Paragraph X. of plaintiff's complaint.

III.

Deny that these defendants have removed any timber from said lands by extravagant, wasteful or non-lumber-like methods, in violation of equity or good conscience or otherwise, or in violation of the provisions of the mortgage thereto relating.

IV.

Deny that there is now due from the defendant R. C. Bell to the complainants the sum of Five Thousand Six Hundred and Twenty-five Dollars, with interest, or any sum.

And for a further and separate answer and defense to the complainant's complaint, these defendants allege:—

I.

That the mortgage referred to and described in the complainant's complait was executed and delivered by these defendants as a part of the purchase price of the real property therein described, the same having been conveyed to these defendants by deed of the complainants to the defendant, R. C. Bell, made, executed and delivered April 22nd, 1912, and recorded July 31st, 1912, in Volume I. of the Record of Deeds of Wahkiakum County, Washington, page 101.

II.

That the total consideration moving to the complainants, on account of the sale of land and timber described in said deed was the sum of $30,000, of which $7,500 was paid in cash and the balance in and by the execution and delivery of the promissory notes and mortgage described in the complaint.

III.

That in the negotiations antecedent to the sale by the complainants to the defendant, R. C. Bell, of the land and timber described in the complaint and to the execution of the deed herein above referred to, and the purchase-money mortgage re-

ferred to and described in the complaint, James D. Lacey and Company, factors and brokers of timber land, having offices in the City of Portland, Multnomah County, Oregon, acted as agents and representatives of the complainants, and as a matter of inducement to the purchase by defendant, R. C. Bell, of the land and timber described in the complaint, and to induce said defendant to purchase the same and to execute the note and mortgage described in the complaint, as and for the purchase price thereof, the said James D. Lacey and Company represented to the said defendant, R. C. Bell, that they had carefully and accurately cruised said property, and that there was on said property, as shown by said cruise, exclusive of hemlock, 11,584,000 feet, board measure, of good and merchantable timber.

IV.

That the defendant, R. C. Bell, accepted said representation as the representation of the owner of the property and believed the same, and purchased the property and executed the promissory note and mortgage referred to in the complaint as a part of the purchase price thereof, in reliance upon said representations, and would not have purchased said property or executed said promissory note and mortgage as a part of the purchase price thereof if such representations had not been made, and if he had not believed the same.

V.

That thereafter the defendant, R. C. Bell, proceeded to remove timber from the above described

land by careful, workmanlike and lumber-like methods, and has kept accurate and complete record of all merchantable timber cut from said premises, and that the total of such cut and the total amount of merchantable timber on said premises at the time of said sale was less than 8,000,000 feet, to-wit: 7,916,999 feet of merchantable fir, cedar and spruce and of all merchantable timber exclusive of hemlock.

VI.

That the representations of the complainants at the time of the sale of the land and timber described in the complaint made by and through their authorized representatives and agent, James D. Lacey and Company, were false, untrue and fraudulent and that the defendant, R. C. Bell, has been damaged thereby in the sum of $9,167.57.

And for a second and further answer and defense, these defendants allege:

I.

That there was included in the conveyance by the complainants to the defendant, R. C. Bell, in the deed made and executed by the complainants to said defendant, on the 22nd day of April, 1912, and recorded July 31st, 1912, in Book 1 of the Record of Deeds of Wahkiakum County, Washington, at page 101, the following property:

"Also all of the timber standing, growing, lying and being on the Southeast quarter of the Southeast quarter of Section Twenty-four (24) in Township Ten (10) North, Range Eight (8) West of the Willamette Meridian, together with the right to

remove said timber at any time within twenty (20) years from the 8th day of August, 1906."

II.

That the property described in the last preceding paragraph was also included in the purchase-money mortgage, specifically described and set forth in the complaint herein. That neither at the time of the execution of said deed and purchase-money mortgage nor at any time did the complainants have any right, title or interest in or to the property described in the preceding paragraph nor any right to convey the same, nor did the said conveyance vest in the defendant, R. C. Bell, any right, title or interest in or to said timber.

III.

That the defendant has not been able to cut or remove any of the said timber on account of such failure of title, and defendant is informed and believes and therefore alleges the fact to be that there is timber standing, growing, lying and being on said Southeast quarter of the Southeast quarter of Section Twenty-four (24), Township Ten (10) North, Range Eight (8) West of the Willamette Meridian, to the extent of 1,000,000 feet; and that the defendant, R. C. Bell, has been injured and damaged by failure of the complainants to convey title to said timber in the sum of $2,500.

WHEREFORE, defendant, R. C. Bell, prays for judgment against the complainants and each of them in the sum of $9,167.57, as a counter-claim

to plaintiff's right of action and suit on the promissory note and mortgage referred to in the complaint.

KOLLOCK & ZOLLINGER,
Attorneys for Defendants.

"Filed in the U. S. District Court, Western District of Washington, Southern Division, Aug. 20, 1913, Frank L. Crosby, Clerk, by F. M. Harshberger, Deputy."

Amended Reply.

To the Honorable Judges of the District Court of the United States in and for the Western District of Washington, Southern Division:

COME NOW the complainants above named, and with leave of the Court first had and obtained, file this their amended reply to the answer of the defendants filed herein:

I.

Replying to paragraph II. of defendant's answer, on page 2 thereof, complainants deny each and every allegation therein contained and the whole thereof, except that complainants admit the receipt of Sixteen Thousand Eight Hundred and Seventy-five Dollars ($16,875) together with accrued interest thereon, which complainants allege was received by them in payment of certain promissory notes, secured by the mortgage described in the complaint, other than the promissory note set out in paragraph IV. of the complaint filed herein.

II.

Replying to paragraph I. of defendant's first further and separate answer and defense, on page 3 of said answer, complainants admit that the real

property described in the mortgage set out in the complaint was conveyed to the defendant, R. C. Bell, by deed of the complainants to the defendant, R. C. Bell, made, executed and delivered on the 22nd day of April, 1912, and recorded the 31st day of July, 1912, in Volume I., on page 101, Records of Deeds of Wahkiakum County, Washington, but deny each and every other allegation contained in said paragraph I., and the whole thereof.

III.

Replying to paragraph II. of defendant's first further and separate answer and defense, on page 3 of said answer, complainants admit that the total consideration moving to complainants on account of the sale of the land and the timber described in the deed of these complainants to defendant, R. C. Bell, executed the 22nd day of April, 1912, and recorded the 31st day of July, 1912, in Volume I. on page 101, Records of Deeds of Wahkiakum County, Washington, was Thirty Thousand Dollars ($30,000), of which amount the sum of Seven Thousand Five Hundred Dollars ($7,500) was paid in cash at the time of the conveyance of said property, but deny each and every allegation contained in said paragraph II. and the whole thereof.

IV.

Replying to paragraph III. of defendant's first further and separate answer and defense, on page 3 of said answer, complainants admit that in the negotiations antecedent to the sale by complainants to the defendant, R. C. Bell, of the land and timber described in the complaint and to the execution

of the deed for said land and timber and the mortgage referred to and described in the complaint, James D. Lacey & Company, factors and brokers of timber land, having offices in the City of Portland, Multnomah County, Oregon, acted as brokers of complainants; and admit that the estimate made by said James D. Lacey & Company of the amount of timber on said land, as shown by the cruise of said land made by said company and its agents, was, exclusive of hemlock, eleven million five hundred eighty-four thousand (11,584,000) feet, board measure, of good and merchantable timber; but deny each and every other allegation contained in said paragraph III. and the whole thereof.

V.

Replying to paragraph IV. of said further and separate answer and defense, on page 4 of said answer, complainants admit that defendant purchased the property and executed the promissory note and mortgage referred to in the complaint, but deny each and every other allegation contained in said paragraph, and the whole thereof.

VI.

Replying to paragraphs V. and VI. of said first further and separate answer and defense, on page 4 of said answer, complainants deny each and every allegation contained in said paragraphs, and the whole thereof.

VII.

Replying to paragraph I. of defendant's second further and separate answer and defense, on pages

4 and 5 of said answer, complainants admit the allegations therein contained.

VIII.

Replying to paragraph II. of said second further and separate answer and defense, on page 5 of said answer, complainants admit that the timber described in paragraph I. of said second further answer and defense was included in the mortgage specifically described and set forth in the complaint herein, but deny each and every other allegation contained in said paragraph II., and the whole thereof.

IX.

Replying to paragraph III. of defendant's second further and separate answer and defense, on page 5 of said answer, complainants deny each and every allegation therein contained, and the whole thereof; and complainants allege that the amount of timber standing, growing, lying and being on the Southeast quarter of the Southeast quarter (SE¼ of SE¼) of Section Twenty-four (24), Township Ten (10) North, Range Eight (8) West of the Willamette Meridian, is approximately three hundred and thirty-two thousand (332,000) feet, exclusive of hemlock.

And for a further and separate reply to the second and further answer and defense set forth in the answer of defendants filed in the above entitled cause, complainants allege:

I.

That the defendant should not be admitted to allege and should not be stopped from alleging that

neither at the time of the execution of the deed and mortgage between the complainants and defendant, R. C. Bell, nor at any time, did the timber standing, growing, lying and being on the Southeast quarter of the Southeast quarter (SE¼ of SE¼) of Section Twenty-four (24), in Township Ten (10) North, Range Eight (8) West of the Willamette Meridian, together with the right to remove said timber at any time within twenty years from the 8th day of August, 1906, or any right to convey the same, or that the conveyance of the same did not vest in the defendant, R. C. Bell, any right, title, or interest in or to said timber, or that the defendants have not been able to cut or remove any of the said timber on account of such alleged failure of title, or that there is now standing, growing, lying and being on the Southeast quarter of the Southeast quarter (SE¼ of SE¼) of Section Twenty-four (24), Township Ten (10) North, Range Eight (8) West of the Willamette Meridian, timber to the extent of one million (1,000,000) feet, or any number of feet, or that the defendant, R. C. Bell, has been injured and damaged by failure of the complainants to convey title to said timber in the sum of Two Thousand Five Hundred Dollars ($2,500) or any sum, for the reason:

II.

That prior to the consummation of the sale and purchase by and between the complainants and defendants of the said timber on the said Southeast quarter of the Southeast quarter (SE¼ of SE¼) of Section Twenty-four (24), Township Ten (10)

North, Range Eight (8) West of the Willamette Meridian, in Wahkiakum County, State of Washington, with the right to remove the same within twenty years from August 8, 1906, and prior to the delivery to the defendants of the deed conveying said timber so described, to the defendants in the above entitled suit, and prior to the execution and delivery of the notes and mortgage covering amongst other properties, the timber so described, from the defendants to the complainants, more particularly set forth and described in paragraphs IV. and VII. of the bill of complaint filed in the above entitled suit, the defendants knew and were advised of the fact that through inadvertence and mistake, one of the complainant's predecessors in interest to the said timber herein described had recorded his deed in a record book known as "Miscellaneous Records" instead of the record book called the "Record of Deeds," and were advised of the fact that the legal title to said described timber was vested in the complainants, regardless of the fact that said deed had been inadvertently and mistakenly recorded as aforesaid, and having full knowledge of the existence of such facts and having consulted an attorney at law concerning the legal effect of such facts, and acting with full knowledge of the existence of such facts, said defendants agreed to purchase said described timber from the complainants, upon condition as agreed between the parties, that Harrison G. Platt and Robert Treat Platt furnish the defendant, R. C. Bell, with a memorandum of agree-

ment indemnifying said defendants against any damage which they might suffer by reason of the fact that said deed had been inadvertently and mistakenly recorded, and in pursuance of such arrangement an agreement was made and entered into by and between Harrison G. Platt and Robert Treat Platt, parties of the first part, and R. C. Bell, party of the second part, wherein and whereby it was agreed that the parties of the first part should either procure for the party of the second part a deed or deeds sufficient to convey to the said R. C. Bell the said described timber and rights appurtenant thereto, or else protect and save harmless the said defendant R. C. Bell against any damages, charges, or expenses which the said R. C. Bell might incur or suffer by reason of cutting or removing said timber, which said agreement was made and entered into on the 12th day of July, 1912, and was accepted by the defendants contemporaneously with the execution and delivery of the deed referred to in paragraph I, Page 4, of defendants' answer filed in the above entitled suit, being the deed of conveyance from the complainants to the defendants conveying the timber herein described, and which memorandum of agreement was accepted and acted upon by the complainants and the defendants as constituting, together with said deed and the notes and mortgages referred to in paragraphs IV. and VII. of complainants' complaint filed in the above entitled suit, the contract of conveyance of said described timber, and said agreement of indemnity was accepted by the defendants in lieu of any

covenant or agreement upon the part of the complainants as to their right to convey title to said timber so described, and all parties to said transaction, including defendants above named, acted in accordance with the provisions of said agreement of indemnity and have continued to so act since the date of the consummation of the sale and purchase of said described timber between said complainants and said defendants, and defendants have never asserted or attempted to assert, or claimed or attempted to claim, that they did not have knowledge at the time of the execution and delivery of the said deed and agreement of indemnity referred to, of the fact that one of the complainants' predecessors in interest had inadvertently and by mistake recorded his deed of conveyance in the record known as "Miscellaneous Records," and have never claimed or attempted to claim any injury or damage on account of said inadvertence and mistake in so recording said deed, other than as alleged in their purported second and further answer and defense to the bill of complaint of the complainants filed in the above entitled suit, and said defendants have never claimed or attempted to claim, and have never notified or attempted to notify the complainants or the parties of the first part to said agreement of indemnity, or either of them, or anyone acting on their behalf or on behalf of any one of them, that any person or persons whomsoever, had asserted or attempted to assert any right or claim against the title of the complainants to the said timber so described,

on account of the fact that one of the predecessors in interest of the complainants had inadvertently and mistakenly recorded his deed in the record book known as "Miscellaneous Records," or that any person or persons had asserted any claim or right against the title of the complainants to the said described timber upon any other ground, and the said Harrison G. Platt and Robert Treat Platt, parties of the first part in said agreement of indemnity, have, in pursuance of the terms of said agreement, procured a deed sufficient to convey to the said R. C. Bell the timber and rights on said Southeast quarter of the Southeast quarter (SE¼ of SE¼) of Section Twenty-four (24), Township Ten (10) North, Range Eight (8) West of the Willamette Meridian, and now hold said deed, and it was stipulated and agreed by the said defendant, R. C. Bell, in said agreement of indemnity, that there was included on the Southeast quarter of the Southeast quarter (SE¼ of SE¼) of Section Twenty-four (24), Township Ten (10) North, Range Eight (8) West of the Willamette Meridian, not more than three hundred thirty-two thousand (332,000) feet of timber, and the defendants accepted the said deed to the timber so described, together with said agreement of indemnity, with full knowledge of the fact that said agreement of indemnity recited that there was included in said purchase of the timber standing, growing, lying and being on the said Southeast quarter of the Southeast quarter (SE¼ of SE¼) of Section Twenty-four (24), Township Ten (10)

North, Range Eight (8) West of the Willamette Meridian, three hundred thirty-two thousand (332,-000) feet of timber, and said defendants have never claimed or attempted to claim that there was contemplated by said purchase any more than three hundred thirty-two thousand (332,000) feet of timber, other than as by the allegation of their answer set forth in paragraph III., page 5, of said answer, it is alleged that there is now standing, growing, lying and being on said Southeast quarter of the Southeast quarter (SE¼ of SE¼) of Section Twenty-four (24), Township Ten (10) North, Range Eight (8) West of the Willamette Meridian, timber to the extent of one million (1,000,000) feet, which, it is alleged, the defendants have been unable to cut on account of said alleged defect of title, owing to the fact that one of the complainants' predecessors in interest had by inadvertence and mistake so recorded his deed in said "Miscellaneous Records."

WHEREFORE, complainants pray relief as set forth in their original bill of complaint.

PLATT & PLATT,
Solicitors for Complainants.

HUGH MONTGOMERY,
Of Counsel.

"Filed in the U. S. District Court, Western District of Washington, Southern Division, June 15, 1914. Frank L. Crosby, Clerk—By F. M. Harshberger, Deputy."

Statement of Evidence.

BE IT REMEMBERED, That heretofore and upon, to-wit, the 15th day of June, A. D. 1914,

the above entitled cause came on duly and regularly for hearing before HON. E. E. CUSHMAN, Judge of the above entitled Court, at the hour of 2:00 P. M., in the City of Tacoma, Washington,

The Complainants herein being represented by their solicitor of record, HUGH MONTGOMERY, Esq., of PLATT & PLATT, and

The Defendants herein being represented by their solicitor of record, J. K. KOLLOCK, of KOLLOCK & ZOLLINGER:

AND THEREUPON, the following proceedings were had and done, to-wit:

The solicitors for the complainants and defendants made their opening statements to the Court, and thereupon the complainants introduced the following evidence in support of their case:

Complainants' Evidence.

A stipulation between the complainants and the defendants was admitted in evidence without objection and marked "Complainants' Exhibit No. 1," which said stipulation, omitting the title of the court and cause, is in words and figures as follows:

> "WHEREAS, this is a suit to foreclose a mortgage upon real estate and interest in real estate, as described in the complaint, and upon saw logs cut from timber on said real estate and interest therein; and
>
> WHEREAS, heretofore and on the 7th day of July, 1913, the Honorable Judge of the above entitled court made and entered an order requiring the defendants, and each of them, to show cause on the 14th day of July,

1913, at the hour of 10:00 o'clock in the forenoon, why an injunction order should not be issued, herein; enjoining the defendants, and each of them, their agents, servants, employes and representatives from selling, conveying, encumbering or removing from the County of Wahkiakum, in said district and division, one and a half million feet of saw logs described in the complaint, and during the pendency of said order to show cause, the defendants, and each of them, and each of their agents, servants, employes and representatives in charge thereof, or any part thereof, be restrained from selling, conveying, encumbering or removing from the said County of Wahkiakum, the said saw logs, or any part thereof,

NOW, THEREFORE, IT IS HEREBY STIPULATED by and between the complainants above named, acting by Messrs. Platt & Platt and J. O. Bailey, their solicitors of record, and defendants, acting by Messrs. Kollock & Zollinger, their solicitors of record, that upon the execution and filing in the above entitled court of a bond in the sum of seventy-five hundred ($7,500) dollars, signed by the defendant R. C. Bell, as principal, and American Surety Company of New York, a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of New York, for the purpose of engaging in the surety business, and by compliance with the surety laws of the State of Washington and of the United States, authorized to act as surety in the State of Washington, as surety, conditioned that in consideration of the release of said saw logs from the inhibi-

tion of said temporary restraining order, the said principal and surety will abide by and pay or comply with any judgment or decree that may be rendered in the above entitled suit in favor of the complainants and against the defendants, and that judgment and decree may be rendered likewise against said American Surety Company of New York as well as against the defendants, if the above entitled court shall resolve the issues in said cause in favor of the complainants and against the defendants, and that in such case, and such case only, an order may be entered herein releasing from temporary restraining order the said saw logs.

It is the purpose and intent of this stipulation that the said bond shall stand in the place and stead of said mortgaged property released, and that the above entitled court shall have jurisdiction in any decree that may be rendered in favor of the complainants and against the defendants to include in said decree a judgment against the principal and surety on said bond without the necessity of the complainants herein bringing action upon said bond in another proceeding.

Nothing herein shall be construed as inhibiting any of the parties hereto from appealing from any decree rendered by the above entitled court, to the Circuit Court of Appeals of the United States, for the Ninth Circuit, and during the pendency of such an appeal and until the conclusion thereof, said bond shall continue in full force and effect, and the same judgment and decree may be rendered against said principal and said surety in said appel-

late court, or upon any retrial of said cause in the above entitled court, in case said appellate court or this court shall decide the issues in this cause in favor of complainants and against defendants.

PLATT & PLATT AND J. O. BAILEY,
Solicitors for complainants.

KOLLOCK & ZOLLINGER,
Solicitors for defendants."

Thereupon there was admitted in evidence a bond executed by R. C. Bell and the American Surety Company, dated July 12, 1913, which said exhibit was marked "Complainants' Exhibit No. 2," and is in words and figures, omitting the title of the court and cause and signatures, as follows:

"WHEREAS, R. C. Bell and Mary A. Bell, on the 22nd day of April, 1912, executed and delivered to Mary E. C. Morley and Fred Morley, her husband, their mortgage upon certain land and standing timber and interest in land in the County of Wahkiakum, State of Washington, which said mortgage was so executed and acknowledged as to be entitled to record, and was recorded on the 27th day of July, 1912, in the records of mortgages of Wahkiakum County, State of Washington, in volume 1, page 88, where at all times since it has remained of record and unsatisfied as to the indebtedness hereinafter referred to, and

WHEREAS, said mortgagees have filed in the United States District Court for the Western District of Washington, Southern Division, a suit to foreclose said mortgage against the property therein described and certain

timber cut therefrom and within the jurisdiction of said court, and

WHEREAS, heretofore and on the 7th day of July, 1913, the Honorable Judge of the above entitled court made and entered an order requiring the defendants, and each of them, to show cause on the 14th day of July, 1913, at the hour of 10:00 o'clock in the forenoon, why an injunction order should not be issued therein, enjoining the defendants, and each of them, their agents, servants, employes and representatives from selling, conveying, encumbering or removing from the County of Wahkiakum, in said district and division, one and a half million feet of saw logs described in the complaint, and during the pendency of said order to show cause, the defendants, and each of them, and each of their agents, servants, employes and representatives in charge thereof, or any part thereof, be restrained from selling, conveying, encumbering or removing from the said County of Wahkiakum, the said saw logs, or any part thereof,

NOW, THEREFORE, R. C. Bell, one of the said defendants, as principal, and American Surety Company of New York, a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of New York, for the purpose of engaging in the surety business, and by compliance with the laws of the United States and the State of Washington authorized to engage in the surety business in the State of Washington, as surety, are held and firmly bound unto Mary E. C. Morley and Fred Morley, in the sum of seventy five hundred dollars ($7500).

The condition of this obligation is such that WHEREAS, in consideration hereof a stipulation has been entered into by and between the said mortgagees, the complainants in said suit, and said mortgagors, the defendants in said suit, acting by their respective solicitors of record, wherein and whereby in consideration of the modification of said temporary restraining order and an order of court thereon relieving said saw logs from the inhibition of said temporary restraining orer, and the turning over of said saw logs to the defendants, the principal and surety herein agree to and with the complainants herein that in the event that a judgment and decree is entered in said suit in favor of the complainants and against the defendants, the said judgment shall be likewise rendered against the surety herein, as though it had been a party defendant to such suit and to the obligations sought to be enforced therein, it being the intent and purpose of this bond that the liability of said surety shall take the place of and be in lieu of said mortgaged property released from the inhibition of said temporary restraining order.

The liability of the principal and surety hereunder shall continue until and including final judgment and decree in the said suit and satisfaction thereof.

Nothing herein shall be construed as prohibiting either party to such suit from appealing the same to the United States Circuit Court of Appeals for the Ninth Circuit.

IN WITNESS WHEREOF, the principal above named has hereunto set his hand and seal, and the said surety has hereunto set its

corporate name and seal by its proper officers thereunto duly authorized this 12th day of July, 1913."

The foregoing together with the admission in the pleadings being the complainants' case in chief, the defendants, to maintain the affirmative matter set up in their answer, introduced the following evidence, to-wit:

R. C. BELL, one of the defendants herein, was called and sworn as a witness on behalf of the defendants, and in answer to interrogatories propounded to him by Mr. Kollock of attorneys for the defendants, testified as follows:

"My name is R. C. Bell. I reside in Portland, Oregon, and am engaged in the logging business and have been engaged in said business in Portland about twelve years. Through the agency of Lacey & Company I had business dealings with Mary E. C. Morley and Fred Morley in reference to the purchase of certain timber from them, in the year 1911."

Q. Will you state how this particular tract of timber was first called to your attention, Mr. Bell?

MR. MONTGOMERY: Now, if the court please, I assume that the evidence now being offered is being offered in connection with the first purported defense, and I desire at this time to interpose an objection to this testimony as being incompetent, irrelevant and immaterial, upon the ground and for the reason that the facts stated in said purported defense and answer are insufficient in law to constitute a defense in a suit of this kind. The specific allegations set forth

in the answer are that the complainants, acting through the James D. Lacey Company, represented to the defendant, R. C. Bell, that they had carefully and accurately cruised said property, and that there was on said property, as shown by said cruise, exclusive of hemlock, 11,584,000 feet, board measure, of good, merchantable timber, and the position of the complainants is that an allegation of that kind, and the words set forth in the answer, are insufficient to constitute a basis for fraudulent representation. The allegation, as Your Honor will note, is not that we represented unqualifiedly that there was on this ground 11,584,000 feet of timber, but that we had cruised this property, and that the cruise was 11,584,000 feet of timber. Now, our position is that the only evidence admissible under a pleading of this kind would be that, in truth and in fact, we had handed him one cruise and substituted another, or that our cruisers had gone upon the ground and made one cruise, which showed a certain number of feet, and that we had represented to him a different cruise. That is literally what we are charged with by this answer, that we had openly made fraudulent representations as to the amount, and for those reasons, and in view of the nature of the inquiry propounded, I conclude that they are relying upon general representations, and I desire to interpose an objection at this time.

THE COURT: I will rule upon the whole matter after the testimony is in. The objection will be overruled at this time.

Exception allowed.

A. It was along in the latter part of October,

1911, that I received this letter from the Lacey people that they had a desirable tract of timber, and this is the letter that brought us together.

MR. KOLLOCK: I will offer in evidence said letter from the James D. Lacey & Company, under date of October 21, 1911, addressed to the Campbell Logging Company, Deep River, Washington.

MR. MONTGOMERY: I desire the record to show a continuing objection to all of this line of testimony, and particularly as to this letter, as being incompetent, irrelevant and immaterial, and for the reasons more particularly set forth in the objection to the other question.

THE COURT: Objection overruled; it will be so understood.

Exception allowed.

Thereupon said letter was admitted in evidence and marked "Defendants' Exhibit A."

"The Campbell Logging Company of Deep River, Washington, is a logging company composed mostly of myself. Subsequently to this letter I took this matter up with James D. Lacey & Company and called on the Lacey people and met Mr. Langille, the author of the letter marked 'Defendants' Exhibit A.' I told Mr. Langille that I was looking for a show like that, and I would like to have him go farther into it and explain what there was in there, and he gave me some figures, and I drew a map from the piece of paper that Mr. Langille gave me at that time, stating how many feet and the different kinds of timber that there was on

there. This paper is the identical map and estimate prepared by me at the time of this conversation with Mr. Langille and in his presence."

Thereupon said paper was introduced in evidence over the continuing objections of complainants and marked "Defendants' Exhibit B."

"'9480 Y. F., 300 C., 1804 Spr., 3077 Hem., 14661 total,' in the upper lefthand corner of Defendants' Exhibit 'B' are in my hand writing, and were placed upon that paper by dictation of Mr. Langille. I placed them there as he read them off from some data that he had. The total represents million feet board measure. That would be fourteen million, two hundred and some odd thousand. That would be nine million, four hundred and eighty thousand feet of yellow fir, three hundred thousand cedar, one million, eight hundred and four thousand spruce, and three million, seventy-seven thousand hemlock.

"During said conversation with Mr. Langille and after adding the stuff up, and seeing the different varieties, I told Mr. Langille I was not looking for hemlock; that I could not use it, but that the cruise on the spruce, fir and cedar, which made about 11,584,000, would be attractive, if there was that much there. He wanted thirty thousand dollars for that property, and I said, 'Mr. Langille, I would not give you thirty thousand dollars for 11,584,000 feet of timber, because that is too much, but the general run of timber is that it should exceed the estimate. Now, I presume this is a fair—a careful estimate of that, with a fair over-run. If you tell me that it will run 12,000,000 feet, I will give you thirty thousand dollars; I will give you two dollars and a half per thousand and will throw out the hemlock.' He said, 'I be-

lieve it will run twelve million feet; it has been cruised conservatively.' That is all.

"I did not have any knowledge of the standing of James D. Lacey & Company as timber cruisers in Portland and vicinity at this time, except from general repute, which was to the effect that they were careful cruisers and could be relied upon. I knew that this timber was large, overgrown yellow fir, which was the bulk of the product. The only discussion which I had with Mr. Langille at that time about the character of the timber was regarding the yellow fir, and he simply represented it to be yellow fir. I had not paid to exceed two dollars and a half before this for timber of that character and in that vicinity. The last I had bought from Weyerhauser was a price of $2.80, and that is why I assumed I could pay on that market two dollars and a half a thousand. I had not paid any in excess of that at that time. My experience in purchasing from Weyerhauser had been that I had invariably had an over-run always in excess of what I had figured on at the purchase price. I never cruised after them. The estimates made and furnished by the Weyerhauser Company are no doubt made for selling purposes, because they generally buy their timber by the acre and get it as cheap as they can, and then they have a very careful estimate of what is on it in order to get the price. It was first called to my attention in the fall of 1912 that there would be a material variation in the cut from the estimate upon which I purchased the property. My foreman, having the data as to the amount there, told me it was not going to come out, and, therefore, I had them make a survey of what was left, and found it was from—found that it was going to run a lot short,

and I wrote to the Lacey people of the fact, and stated that we had better get together and adjust the matter; that it was going to fall away short. At that time I did not have any experting done on the cut and output from the timber. We had a complete record of all of the output from day to day and the final disposition of it to the mill. At the time I called the complainants' attention to the shortage I gave them a complete record of the amount of logs we had logged and the probable amount that was left. That was in the fall, as I recall it, of 1912, and might have been October or November. I got a reply shortly afterwards which would indicate the time. This letter, dated May 1st, 1913, addressed to me and signed by James D. Lacey & Company by Langille, is the reply to which I refer. I must have been mistaken as to the date being in the fall. As shown by this letter it was probably some time in the spring of 1913, possibly in April of that year. I am not confident that the letter with the mention of the shortage went to him just at that time, or when, but that is the result of the letter. The complete statement of the output of the tract, as shown by the log scale and the Scaling Bureau's scale—the computations of the total output for this statement to James D. Lacey & Company—was made by H. V. Carrington, our public accountant. This letter of May 1, 1913, is a letter which I received in response to our estimate for reduction of the balance due on the note."

Said letter was introduced in evidence over the continuing objections of complainants, and marked "Defendants' Exhibit C."

"Mr. Carrington has the actual amount of timber, merchantable fir, removed from this tract

from the time we commenced logging it until it was finally denuded of all timber. I have recently had an independent cruise made of the condition of the timber on the land covered by the pleadings in this case. I ordered the cruise to be made by the firm of Brown & Brown. This firm are timber cruisers located in Portland, Oregon. I received a report from them, and this is the report received by me from Brown & Brown as to the condition of this timber."

Q. Now, reverting to the time of the closing of the original deal for the purchase of this tract, I will renew the question I started to ask you a little while ago, and ask you whether, in the closing of that transaction, your attention was specifically called to the condition of the title to a certain tract, consisting of forty acres described as the southeast of the southeast of section 24?

MR. MONTGOMERY: Now, if the court please, I would like to have the record show a motion on behalf of the complainants in this action to strike from the record all of the testimony offered upon the question of alleged fraudulent representations upon the ground and for the reason that the same is incompetent, irrelevant and immaterial, under and in accordance with the answer—with the allegations in the answer filed in this case, for the reason that the claim of the defendants, as shown by said answer, is that the complainants represented they had made a cruise, and that said cruise showed a certain number of feet, and it is not alleged that any representations as to the exact amount of timber, independent of the

cruise, were made by the defendants, and upon the further ground that it appears from the testimony of the witness that the statements of Mr. Langille, of the James D. Lacey Company, alleged to have been made on behalf of the complainants in this case, were matters of a belief and an opinion, and not statements of fact.

(Argument of counsel).

THE COURT: The motion will be denied at this time, with the intention of ruling on this matter all together when all of the evidence is in.

Exception allowed.

(Last question read by the reporter.)

MR. MONTGOMERY: Now, if the court please, as to the question, I desire to interpose an objection upon the ground and for the reason that, as shown by the admitted allegations of the pleadings in this case, the entire real property involved was finally and subsequently transferred by a deed of conveyance, and that in cases of the selling of real property there is no implied warranty of title, and that in sales of real property the parties are held entirely to the covenants in their deeds, and upon the further ground that the deed of conveyance is the best and primary evidence of what the parties agreed upon as to the question of title, and that any prior negotiations, antedating the sale of the property, were merged in the deed of conveyance.

Objection overruled. Exception allowed.

Q. By whom was your attention called to the title of that particular forty-acre tract?

MR. MONTGOMERY: I would like to amplify the prior objection, upon the further ground that

upon the allegations of the defense pleaded in this case, there is no allegation of any breach of covenant, and a mere naked statement that the complainants in this case failed to convey a good title.

(Argument of counsel).

THE COURT: Objection overruled for the present. I will rule finally on that along with the other matters when the evidence is all in. Exception allowed.

(Last question read by the reporter.)

A. My attorney, Mr. Kollock.

"At the time negotiations were taken up, no evidence of title was submitted to me personally by or furnished me by the complainants here or their representatives, James D. Lacey & Company. No abstract was submitted to me. They gave me an abstract of title with the proposed contract of sale. This is the abstract which was delivered to me at the time of the sale, I think by Mr. Langille. I do not know. It came with the contract. I believe it was delivered to me at the time of teh delivery of the contract. This paper is the contract for the purchase of the property."

MR. KOLLOCK: I will offer in evidence this contract, May 24, 1911, not for the purpose of establishing any rights, but for the purpose of proving an admission by complainants as to the condition of title—in connection with the testimony of this witness.

MR. MONTGOMERY: I object to the introduction in evidence of this document upon the ground and for the reason, as shown by the pleadings in this case, that all prior negotiations

were merged under the principles of law in the subsequent deal.

Objection overruled. Exception allowed.

Mr. KOLLOCK: I will now offer in evidence as a part of testimony of this witness, abstract of title, certified by the Wahkiakum County Abstract Company, Cathlamet, Washington, covering the Southeast quarter of the southeast quarter of section 24, township 10, north range 8 west, and specifically offer in evidence that portion of the abstract which refer to that particular forty-acre tract, and especially the instrument appearing at page 4 of said abstract, being a contract between Christopher William Whitford and Elmira Whitford, his wife, to one Ernest Strom, dated August ——, 1906, and indicated by said abstract to have been recorded August 14, 1906 in Book A, Miscellaneous Records, pages 223 and 224 thereof, and the subsequent conveyances,— the subsequent entries in said abstract, showing subsequent conveyances by Christopher William Whitford and Elmira Whitford, his wife, of the real property described in said contract and by their successors, and ask leave to substitute copies of such portions of the abstract as are now offered in evidence.

MR. MONTGOMERY: I desire the record to show a continuing objection to this particular piece of evidence, being the abstract in question, and also the further and more particular objection that the abstract and the deeds shown therein are mere copies and not the best evidence and not certified copies of the records as required by law.

THE COURT: Objection overruled. The objection would be good if it had not been shown that the

abstract was furnished by the complainants' agent.

MR. MONTGOMERY: I understand, if the court please, that the abstract was not offered in its entirety.

MR. KOLLOCK: It was offered in its entirety, but particularly in reference to these deeds, in order to save the trouble of copying; that was all.

Said abstract was thereupon admitted in evidence and marked "Defendants' Exhibit F."

"I do not recall whether or not any subsequent agreement was delivered to me in reference to the title to this particular forty-acre tract. I believe that I was notified by my attorneys or agents that an agreement had been accepted by them with reference to the title to said land. I believe that this paper was delivered to me about the time it bears date, to-wit, July 12, 1912, by John K. Kollock, my attorney, as having been received by him from Platt & Platt, attorneys for the complainants in this case."

Thereupon said paper was offered and admitted in evidence without objection, and marked "Defendants' Exhibit G."

"Up to this time no notice, written, formal or otherwise, has been served upon me at any time that the complainants in this case, or their attorneys, Platt & Platt, the signers of the agreement introduced in evidence, marked 'Defendants' Exhibit G,' had procured title to the property in question and were ready to or had conveyed it to me. I took advice of counsel as to my rights in going upon the property in question and removing the timber at the time during my cutting of the timber on the rest of the property included in this pur-

chase. I asked if it would be safe in taking it under that agreement and possibly other people owning the stuff, and I was advised that I really would not be safe. The reason was given in this way; that if they did not own it and other people did, and I took it, I would surely be stealing it and under the law they would recover three times its value, so I passed it up and went by. We were past there by October of 1912. We could not take it after that. I mean that we could not have taken it after that because it did not represent very much timber and we have to go to a great deal of expense to get timber, and not having taken it at that time we could not take it profitably by taking it now, because we could not reach it. Mr. Langille did not tell me what there was on that particular forty acres. I requested them to submit a cruise, to submit some figures as a cruise for the Lacey people of the stuff that was on this forty-acre tract at the time this agreement was made. This agreement specifies 332,000 feet of timber on said tract, and I understood that those figures were furnished by Mr. Langille as his cruise for the property, and I accepted it as such. Yes, I was willing to accept that as a basis. I had taken his other figures and I had no reason to doubt it. The purchase price was based upon the maximum figures discussed between me and Mr. Langille, which was two and a half per thousand. The statement in said agreement (Defendants' Exhibit 'G') of two dollars per thousand feet is not correct. That is an error. The actual price at which I purchased the timber is as it stands now. It would be—we cut about eight and a half million out of the twelve million; it is two and a half million short. That would bring the price up between three and a half and three

seventy-five per thousand. I believe that an independant cruise of this timber of the forty-acre tract was included in the Brown & Brown cruise. I do not know exactly the figures as furnished by Lacey & Company to me, but it was somewhere in the two hundreds. By refreshing my memory from this paper I am able to state that the amount was two hundred sixty-six thousand. This is a deed of the property."

Thereupon said deed was offered and admitted in evidence without objection, and marked "Defendants' Exhibit H."

This being all of the direct examination of Mr. Bell, the following motion was made by Mr. Montgomery of counsel for complainants, to-wit:

Now, I desire at this time to have the record show a motion to strike all of the testimony of the witness as to the question of the alleged defect in the title involved in this case, upon the ground and for the reason that there are no facts pleaded in the answer sufficient to constitute a defense upon this question, and for the further reason that there is pleaded no alleged breach of covenant, neither expressed nor implied, and upon the further ground that nothing has been offered in evidence to show that in the deed from the complainants to the defendants there was any express covenant of seizin or of title, and that in actions and dealings concerning transfers of real property the parties are bound to rely upon covenants contained in the deeds.

THE COURT: The same ruling. Exception allowed.

Upon CROSS-EXAMINATION by Mr. Montgomery of counsel for the complainants, the witness, Mr. Bell, testified as follows:

"Prior to buying this so-called Grays River tract, I had done considerable logging down in that vicinity and all around there. I had not been on this Grays River tract, but I had seen it. Up to the time of our first negotiations I had never been near it. I had logged about ten miles from it as the crow flies, I guess. This letter which was introduced by the defendants, reciting that there was fourteen million feet of timber, referred to fourteen million including the hemlock. I presume the first time that I said to the Lacey Company that there was a shortage was in the spring of 1913, although I thought I had notified them in the fall of 1912. That was not about the time that they were beginning to press me for payment. I did not know that that note was due at that time. Yes, it was dated August and there were other notes, but all the other notes had been paid. I do not think that at the time of my complaint that that note was due. I used donkey engines in my work down there. In operating that tract I think we operated at times three donkey engines, most of the time two. I left some good lumber behind. I found by the cruise of Brown & Brown that we had left something like one million two hundred thousand feet, but it was inaccessible and we left it there. I mean by inaccessible that we could not reach it. Anything that was left we could not reach. No, that was not the fault of the cruise, not as to that 1,200,000 feet. We should have gotten that. The only timber which we left down there, outside of this forty acres, is about 1,200,000 feet that could not be brought in and it is there yet. We located there about the Fourth of July and started right after the Fourth of July logging in 1912, and we were through log-

ging there about the following April, about nine months."

On RE-DIRECT examination the witness testified as follows:

"I testified in response to a question asked by counsel for the complainant that I learned there was one million two hundred thousand feet of timber which might have been taken but is still remaining od the tract. I learned this from the report of Brown & Brown, to which I was referring, which is marked 'Defendants' Exhibit D,' for identification."

H. V. CARRINGTON was called and sworn as a witness on behalf of the defendants, and in answer to interrogatories propounded to him by Mr. Kollock of attorneys for the defendants, testified as follows:

"My name is H. V. Carrington and I reside at Portland, Oregon. My business is public accountant. For my information and for Mr. Bell's information, in accordance with instructions from Mr. Bell, I made a statement of the total output from the property in question, both as to log scale and by the Columbia River Scaling Bureau scale. I started my record with the cruisings given to me by Mr. Bell as coming from the Lacey Company. I received in our office weekly an exact transcript of the train scale, which is a summary of each log as it comes from the train, as it goes into the slough. I compiled those by months. When the rafts are charged in accordance with the Columbia River Scaling Bureau scales, I took the rafts as shown by that scale by months and called that the scales as compared with the cut. This is a summary prepared by me from the original

records. The Columbia River loggers as a rule are the men employed by the Bureau for their scaling. I will say in connection with these figures that not all of the rafts were scaled by the Bureau. Occasionally it was more convenient for us to have them scaled by the mill, but most of them were scaled by the Bureau. In either case, in connection with our men, the scale was either by a Bureau of log scalers, independent altogether of defendants in this case, or any of its companies, or by the purchaser to whom we were selling the logs."

MR. KOLLOCK: I will offer this in evidence.

MR. MONTGOMERY: I would like to ask a few questions:

Q. Have you any knowledge, outside of the books, of the exact output of that timber down there? You were not on the ground, were you?

A. I was not on the ground; no, sir.

MR. MONTGOMERY: If the court please, I would like to interpose an objection to this evidence on the ground that the same is incompetent, irrelevant and immaterial, and not the best evidence of the facts sought to be proved. In connection with that objection, I desire to state that I am fully aware that we are in a court of equity, and that the rules of evidence are liberal, and perhaps more so than in a court of law, but the complainants here are being charged with fraud, fraud as to the amount of timber which it is claimed they represented. Now there is an attempt to show that amount of timber did not materialize by certain copies of records which this witness received from somebody else, without any effort to procure a single man upon the

ground or who made the scale, or who sawed the logs, or cut the timber, regardless of the fact that their depositions can be taken, no matter where they are located in the United States, and yet they come in here with such character of evidence as this and seek to prove fraud as against us. It seems to me that they should be held strictly to the character of evidence that we have produced and not from secondary evidence of this kind.

THE COURT: Do I understand this compilation is made from the books of the company for which you were bookkeeper?

MR. KOLLOCK: I will ask the witness to show the court these various papers I am now handing him.

MR. MONTGOMERY: I have no objection to these particular documents not being the original books. My objection goes to the evidence as not being the best evidence.

MR. KOLLOCK: That it is not the best evidence is good, because it is a copy?

MR. MONTGOMERY: That the books themselves, or anything taken from them, is not the best evidence of the facts sought to be proved.

Objection overruled. Exception allowed.

Thereupon said papers were admitted in evidence and marked "Defendants' Exhibit I."

"I have not figured the exact percentage variation between the train scale and the Log Scaling Bureau's scale, but I think it is within three per cent in favor of the original train scale. We tried to keep our train scale down generally within five per cent. We got it within three per cent. Those

figures I have compiled, as far as the cut is concerned, from the original camp records of train scales. The amount under the head of "Scales" was taken from the original record either reported by the Log Scaling Bureau or compiled from the actual scale books."

MR. MONTGOMERY: For the preservation of the record, I desire to interpose a motion on behalf of the complainants to strike all of the evidence of this witness, upon the ground and for the reason that there are no facts alleged as a defense in this case which constitute fraud in contemplation of the law, and that the evidence is, therefore, immaterial to the issues in this case involved.

Objection overruled. Exception allowed.

On CROSS-EXAMINATION by Mr. Montgomery, of counsel for complainants, the witness further testified as follows:

"Discrepancies exist at times between different methods of scaling. A train scale is always a rougher scale than a raft scale. Two reliable scalers can make a variation as high as five per cent on scaling a raft."

THEODORE BROWN, called and sworn as a witness on behalf of the defendants, and in answer to interrogatories propounded to him by Mr. Kollock of attorneys for the defendants, testified as follows:

"My name is Theodore Brown. I reside at Portland, Oregon, and I am the President of Brown & Brown, Incorporated, dealers in timber lands. Cruising of timber for parties under contract is a part of the business of Brown & Brown, Incorporated. We had an order from Mr. R. C. Bell to

report on timber land in Wahkiakum County, Washington, and such a report was made. Defendants' Exhibit 'D' for identification is our report. Horatio J. Brown is the Secretary of Brown & Brown, Incorporated. He has charge of the field department of the business, and while this report bears the endorsement of 'Prepared by Brown & Brown, Incorporated, Portland, Oregon,' it contains a communication signed by Horatio J. Brown. Mr. Horatio J. Brown is a member of the corporation who is charged of the matter of cruising. The field department is entirely under his supervision and jurisdiction. Horatio J. Brown has had thirteen years' experience in the woods, and approximately seven years in the employment of the Government, during most of which time he had charge of the timber scales on various reservations. After his connection with the Government was terminated, and before the organization of Brown & Brown, Incorporated, he was in the employ of James D. Lacey & Company, working out of their Portland office for approximately eighteen months."

MR. KOLLOCK: I will now offer in evidence the report of Brown & Brown, Incorporated, on the timber in question, addressed to Mr. R. C. Bell, Portland, Oregon.

MR. MONTGOMERY: I desire the record to show an objection to the introduction of this document upon the ground that the allegations pleaded in the defense in this case are insufficient to constitute, in contemplation of law, fraud in a case of this kind, and upon the further ground that it appears from the testimony of the witness as to the identification of this document that the cruising was done by a party other than himself,

and that, therefore, the document in question is secondary evidence.

Objection overruled, Exception allowed.

Thereupon said paper was admitted in evidence and marked "Defendants' Exhibit D." It is stipulated that this Exhibit "D," consisting of photographs, tabulations and statement, may be referred to without printing.

H. V. CARRINGTON was recalled as a witness on behalf of defendants, and upon direct examination by Mr. Kollock of attorneys for the defendants, further testified as follows:

"I made a computation for my own information from the original records of Mr. Bell in connection with the Morley tract from the timber actually cut on the Morley property, as compared with hypothetical results on the basis of 11,584,000 feet of timber, exclusive of hemlock, as shown by the cruise, to see how we were coming out. I have a memorandum of those figures in my possession. First of all I took the total amount of our gross sales for that period; that is, sales during the period of the timber cut from that particular tract. In those sales, there was a certain amount of hemlock. During that period we sold the hemlock at $6.00. So I took the total shown for hemlock, in feet, on a basis of $6.00, and deducted this from our total sales; this showed that we made actual sales and received money for the same—fir, cedar and spruce, 8,412,516 feet. That, of course, included three or four hundred thousand feet of timber purchased from Johnson, but, as necessarily goes, we could not distinguish one log from another. We actually received for that timber—for these logs—an aver-

age price of $9.55 which made a total sale—gross sale—of $80,319.91. Now, our timber was to cost us $30,000.00; therefore, our gross profit, as between merchandise sold and merchandise purchased, was $50,319.91. Now, on our expense, both operating, construction and overhead, the way we run our accounts there is only one fluctuation and that is on logging the raft. I cannot say that the overhead and the operation is one charge on that one class of labor. As between 11 million and 8 million, for this reason: That our blacksmith account would necessarily remain the same. Our actual expense consists of bookkeeper's and foreman's time. That is a fixed charge. Our industrial insurance necessarily remains the same. Our railroad operation, consisting of locomotive engineer and two brakemen, remains the same. Our rights of way remain the same. Therefore, the only difference is our logging 8 million and any other amount during the same period would only be the pro-rata; as a matter of fact, it would not be pro-rata, because, taking the same section, it does not cost twice as much to do the work in the woods to get out ten million as it does to get out five. It does not cost very much more to log; it is getting ready to log that costs the money. However, I have allowed the pro-rata in default of being able to fix on any other definite rate. As a matter of fact, it would cost less than one-half of the pro-rata to get out an additional two or three million. Showing the actual sales as a basis, we find, as I said, that our gross profit was $50,319.91. Our operating expense, as explained in detail, actually cost us $45,-096.05. That left us a profit of $5,223.06. Our railroad construction and maintenance during that period, for that particular tract, cost us $10,439.48,

so that our net operating and construction loss was $5,215.62. Our overhead expense would naturally remain the same in each case. What we call overhead is our general office expense, interest charges, salaries, traveling expense, and taxes. These, during the period of the cut, amounted in all to $11,-344.59, showing a final loss on the operation of $16,-560.21. On the other hand, taking as a basis the supposed cruise of 11,584,000 feet, I have deducted from that 1,200,000 feet which we admit was inaccessible and had to be abandoned. That leaves 10,384,000 feet to which, of course, must be added timber that we purchased from adjacent lands, amounting to 393,792 feet. On that basis, we could have sold 10,777,792 feet, for which we would naturally have obtained the same average price of $9.55, so that our gross sales would have been $102,927.91. From that I have deducted the Lacey charge for the timber purchased, $30,000. Our gross profit, therefore, as between merchandise purchased and merchandise sold, would have been $72,-927.91. Our operating expense would be the same as in this statement with the exception of our logging and rafting charge. As I said before, I have increased that pro-rata with the hypothetical cut, although that is not true. Blacksmith and other operating expense would remain the same. The result of that computation would be that our operating expense would have been $54,418.19. This deducted from our gross profit, would leave an operating profit of $19,509.72. Our railroad construction and maintenance would naturally have remained the same, $16,439.48. Therefore, our net operating and construction profit would have amounted to $8,070.24. Our overhead expense would have remained the same except that the dis-

count on the increased sales figured on a basis of 60 days at 7 per cent, would have increased our interest account by that amount. Our overhead expense would have been, therefore, increased to $11,608.35, in which case, our final loss on the operation would have been $3,538.00. This shows that on acount of the shortage in the cruise and the fact that our expense was, not in logging, but in getting ready to log, our loss was greater than it would have been had the cruise held out, by $13,-022.10; in other words, the shortage on the cruise cost us at least $13,000.00; probably in reality, cost us more."

On CROSS-EXAMINATION by Mr. Montgomery, of counsel for the complainants, the witness further testified as follows:

"It is practically true that the charge to railroad which I itemized applies to each of the other items as expense in hauling timber from such lands which have been since puchased in the vicinity of the tract in question, but I have used the same figures in each set. I understand that we are now logging from lands in the rear of this tract by this railroad. I have not been down to the camp this year. Our records, however, show that fact. I always make it a point to figure out the profits received from each raft. During the period of time we were operating down there I do not know that the market for cedar was particularly different than the market for any other logs. I have forgotten the exact proportion of cedar marketed. I have not got that in my summary. I have got the fir, cedar and spruce altogether. I have forgotten the exact amount. I do not recall that there was any good market for cedar during the period of this operation. Referring to certain

timber as being inaccessible, I mean that the lay of the land was such that to make preparations would have cost us more than the timber was worth. That is not part of the timber included in the forty acre tract. I guess that we included in that one million two hundred thousand feet of timber the timber on the forty acre tract."

Q. Now, you have spoken of the expense of operating; is there any expense in fuel for camps?

A. Why, you may have—fuel for what?

Q. For camps, in general; cook-houses, and the like?

MR. KOLLOCK: I submit this is not a proper cross-examination. This man does not purport to have a thorough knowledge of the carrying on of the work in the camps. This gentleman is an accountant.

THE COURT: Objection overruled. He may answer.

A. I have been down to the camp several times, as once I required them to get up a statement for reference for that purpose.

Q. How about the expense for operating donkeys?

A. In cutting down a tree there is a certain amount of waste, that is all.

Q. You were down on the ground to see these operations?

A. I did not make any effort to be there. I have been there on several occasions.

Thereupon, defendants offered in evidence the statement from which this witness testified, which

said statement was admitted in evidence over the continuing objections of the complainants, and marked "Defendants' Exhibit J".

MR. KOLLOCK: I desire this in evidence as part of the testimony of Mr. Brown, being a report of the amount of timber left on certain lands, prepared by Brown & Brown, Incorporated, of Portland. (Reading from Defendants' Exhibit "D").

JOHN K. KOLLOCK, of counsel for the defendants, was called as a witness on behalf of defendants, and testified, over the continuing objections of the complainants, as follows:

"At the time of the execution of the preliminary contract of purchase of this property, a definite agreement of purchase and abstract of title, which has been introduced in evidence, was handed me by Mr. R. C. Bell, with the original opinion on the title of Platt and Platt, addressed to James D. Lacey & Company enclosed therein, with the statement that it had been kept by Mr. Lacey for examination of title. I made an examination of the title and found the title to all of the tract, except the southeast of the southeast quarter of Section 24, to be satisfactory. As to that particular 40, my attention was immediately attracted to page four of the abstract which was a conveyance from Christopher William Whitford and wife to Ernest Strong, purporting to be a conveyance of the timber upon this property, the southeast of the southeast of Section 24. That instrument is shown by the abstract to have been recorded on August 14, 1906, in book "A" of Miscellaneous Records. A subsequent conveyance was made by Mr. Strong, the grantee

in that deed, which property, in this abstract of title, said to be vested in Ernest Strong by that deed was subsequently conveyed by this conveyance to Mrs. Morley. Subsequently, however, the grantor in that deed, by a more or less extended series of conveyances, conveys the land to other parties, some of whom appeared by the form of the conveyance, which was subsequently shown, to be residents of New Mexico. I advised Mr. Bell that in my opinion that instrument purporting to be a timber deed was not sufficient in itself, recorded in the miscellaneous records, to constitute constructive notice to a subsequent purchaser of the land, unless he could show actual knowledge in and of the fact that this instrument was outstanding, and would take the land and all these hereditaments, irrespective of these conveyances,—the miscellaneous records, in my opinion, not being a part of the legal records of the State, but being merely a scrap book for the purpose of preserving evidence until actual knowledge could be shown. I personally took up the matter immediately with the attorneys for Mrs. Morley, with Mr. Harrison G. Platt, the head of the firm of Platt & Platt. My recollection of the conversation with Mr. Platt is that he said that it was not sufficient to constitute constructive notice and that steps would be taken to procure title to the property. At the time that the deed was ready for delivery, or shortly before that time, I was advised by some member of that firm that Messrs. Platt & Platt would agree to give an agreement of indemnity signed by themselves personally to protect Mr. Bell under these circumstances.

That was entirely satisfactory to me, and I so advised Mr. Bell, the financial responsibility of these gentlemen being unquestionable, and the agreement—so-called agreement of indemnity—which has been introduced in evidence, was delivered to me and by me to Mr. Bell. That agreement recites that they would procure and vest in Mr. Bell title to the property and in default thereof would indemnify him against loss occasioned by his cruise of the property. I had a number of interviews, from time to time, with various representatives of the firm of Platt & Platt, particularly Mr. Hindman, at the time we entered into a stipulation for an extension of time to complete the case, to file the reply of the defendants in the case, and on another of these interviews, about five months ago, at the time the last stipulation for an extension of time was filed, Mr. Hindman stated it was the present intention of the firm of Platt & Platt to postpone the prosecution of this case until they had been able to answer in action at law upon previous warranty. Subsequent to this, perhaps two or three weeks after that, Mr. Hindman again came into the office and served me with notice that the case would be set for trial. He said they had decided to go ahead with the case. In addition to being attorney for the company, I am secretary of Mr. Bell's company, and at no time was any notice brought to my attention that title had been perfected or that they were able to or ready or willing to deliver title to this forty acre tract until perhaps two weeks ago, when I was discussing over the phone with Robert Treat Platt the question of the trial,

the time of the trial and so no. Some question came up about this agreement and he said to me then that they had procured title to the property. I have no other knowledge of any attempt to procure title."

On CROSS-EXAMINATION by Mr. Montgomery, of counsel for complainants, the witness further testified as follows:

"I am not clear as to whether or not the indemnity agreement given by Robert Treat Platt and Harrison G. Platt provided that they were either to get him a deed or protect him (referring to Mr. Bell.) At any rate, in connection with that, I would like to say that the question of indemnity came up several times. I told Mr. Bell that the absence of any affirmative action on the part of Mrs. Morley to vest title in him—in my opinion there was no title vested in Mrs. Morley—he should not attempt to operate on the property, because the mere agreement of indemnity did not protect him against trespassing on somebody else's land. I consider that there has been an assertion by some of the predecessors of Mrs. Morley to the title of this land. Christopher William Whitford and his wife are the parties who conveyed. I consider this subsequent conveyance of William Whitford and his wife to other parties of the title by deeds reciting conveyance and warranty without limitation, to be express assertions of their right to this land. I am not sure as to whether the first conveyance was a quitclaim. I found by the abstract which has been introduced in evidence, and which I had in my possession, that on June 10,1908, which was two years after the conveyance to Ernest

Strong of the timber by the so-called timber contract recorded in Miscellaneous Records, Christopher William Whitford and his wife, by warranty deed, conveyed the property in question to Howard S. Smith, which instrument is recorded and shows on page 18 of the abstract. By the grantors there was a quitclaim deed between that deed and the deed that was recorded in miscellaneous records. This conveyance was by the grantors, who were the same grantors that recorded their deed in miscellaneous records. I have not, as attorney for Mr. Bell, and I do not think that Mr. Bell has, ever made an assertion or claim against Mr. Robert Treat Platt or Harrison G. Platt, or either of them, on account of any attempt or assertion in writing as against the title to this forty acres in question here. I consider the deed and this indemnity agreement to procure title, or in default thereof to indemnify him and protect the rights of Mr. Bell as against the grantor; we had the alternative of asserting these rights as we saw fit. Mr. Bell had knowledge of that fact before the mention of this title indemnity agreement. I would say that as to the rights of the title, Mr. Bell consulted me as to whether the deal could be closed. The rights of title being delivered, Mr. Bell being satisfied as to the amount of timber thereon was desirous of closing the deal. He asked me if any arrangements could be made by which he could go ahead and close the deal irrespective of the defective title. He had full knowledge of the title."

Thereupon the defendants rested their case and

complainants thereupon made the following motion, to-wit:

> Before proceeding with the introduction of evidence by way of rebuttal, I desire on behalf of the complainants that the record show a motion to strike all of the evidence introduced upon behalf of the defendants in this case, on the ground that the same is incompetent, irrelevant and immaterial under the issues made by the pleadings in this case, and submit these theories as against the allegations of the answer filed by the defendants in this case, upon the following grounds and in the following particulars: *First*: no defense of false representations has (as has been pleaded,) been shown, it being alleged merely that the complainants represented through their agents that a certain specified cruise showed a certain specified number of feet; *Second*: That the evidence introduced in behalf of the defendants shows the absence of any intent to deceive such as is necessary in defenses of this kind, in that it appears from the testimony of Mr. Bell that Mr. Langille, acting for James D. Lacey & Company, stated to him matters merely pleaded; *Third*: That the facts stated in the defense of fraudulent representations does not state facts sufficient to constitute fraud in the contemplation of the law; *Fourth*: That the evidence introduced in behalf of the defendants as to the question of title is incompetent because the evidence of the defendant shows that a deed was given at the time of the purchase and sale of this land and that the covenants of such deed, if any, controlled over any oral agreement of the parties of any intended un-

derstanding or purpose; *Fifth*: That in the defenses pleaded in this case, no breach of covenant, express or implied, is alleged; *Sixth*: That the evidence introduced on behalf of the defendants is entirely insufficient to show any effort upon the part of the defendants to procure the timber standing upon the so-called forty-acre tract; no evidence of any excuse for not procuring said timber; and no evidence of any sufficiently legal excuse for not procuring said timber on account of such alleged defect of title, has been introduced, and the evidence introduced on behalf of the defendants affirmatively shows that this was a defect—that the alleged defect of title was not a defect in the absence of some overt act or the assertion of some right; upon the further ground that it appears from the evidence introduced in behalf of the defendants that the reason why the timber on the so-called forty-acre tract was not procured was that the same was inaccessible and the failure to procure it was not on account of any alleged defect in title but was because, as testified by witnesses in behalf of the defendants, of the poor condition of the country and their desire to play safe.

THE COURT: I might be inclined to hear from the other side on some of the grounds in your motion, were it not that the case is liable to be appealed. All these matters will be considered in the findings after all the evidence is in. Motion denied. Exception allowed.

Plaintiffs' Rebuttal.

H. D. LANGILLE, a witness called on behalf of the complainants, in answer to interrogatories pro-

pounded by Mr. Montgomery of counsel for the complainants, testified as follows:

> "I am with the firm of James D. Lacey & Company, Manager of the Portland office, and was manager of the Portland office during the years 1911 and 1912, when the transactions involved in this case were negotiated. Prior to the ultimate sale of the real property involved in this suit I had conversations with Mr. Bell concerning the timber involved here. I was present yesterday and heard the testimony of Mr. Bell that at a conversation held with me the deal was talked over and immediately closed. I have a method of fixing the date of that conversation from correspondence in my files. This letter dated October 30, 1911, addressed to Mrs. Fred Morley, is a copy of a letter written by me as representative of Lacey & Company, who were the agents for Mrs. Morley."

Thereupon said letter was introduced in evidence without objection, for the purpose of establishing the date as testified to by the witness, and was marked "Plaintiffs' Exhibit No. 3." As the only purpose for which this letter was admitted in evidence was to establish the date, the said letter is not included herein.

> "Nearly six months elapsed between the date of this conversation with Mr. Bell and the date when the option introduced in evidence yesterday was finally given to Mr. Bell. The substance of the conversation which I had with Mr. Bell at that time is as follows: At the time the preliminary negotiations were taken up, in response to a letter which I addressed

to the Campbell Logging Company at Deep River, Washington, Mr. Bell called at the office. The letter which I referred to is one I think Mr. Kollock introduced in evidence. Mr. Bell seemed to have some knowledge of the property. I described it to him, probably showed him the plat, and he stated to me that he was more or less familiar with the country; that he had been logging in the neighborhood in the same kind of timber, and that he had some general knowledge of this tract. We discussed price and the amount of timber, and I think it was at that time that we discussed terms of sale. Mr. Bell stated he would look the property over with his foreman, and asked me to make a proposition to the owners of the property along the lines which he would undertake to purchase it. As agents for Mrs. Morley we were charged with the investment of her funds. We had purchased that property for her in 1910; purchased it for her account. For the purchasing, we made what we term a preliminary cruise, which is a twelve and one-half per cent. cruise. In other words, counting the trees and so forth on 12½ per cent of the land; simply going once through each forty. The preliminary examination was satisfactory and subsequently, by the cruise of the property, we made a 100 per cent. cruise going eight times across each forty and counting and examining all of the trees as nearly as practicable. On that cruise we purchased the property. That was the cruise that was discussed between Mr. Bell and myself at these negotiations. That memorandum, to which you called my attention, was prepared in my office from

the original field books returned by the man in charge of the cruise, Mr. Collins. I am pretty sure that during the conversation with Mr. Bell that statement was submitted to him in my presence, and must have been because—I cannot swear positively that it was, but I know it is customary in matters of that kind to state all the information that we have."

Thereupon said memorandum was offered and admitted in evidence without objection, and marked "Complainants' Exhibit No. 4."

"I submitted Mr. Bell's proposition to Mrs. Morley; on November 21, 1911, I advised Mr. Bell that his proposition was accepted. At about that time, the memorandum of agreement covering our understanding in the case was prepared and that was forwarded to Mrs. Morley on the 24th day of November, 1911. Under the terms of that agreement he should have exercised his option and made the first payment on the property on the 22nd day of February, 1912, four months after the date of our original understanding. At about the time this payment was due and the option was due and expired, Mr. Bell came to see me and stated that during the life of the option he had been making an effort to procure a right of way from the lines under construction to the timber at the river; that he had met with difficulty in securing some of this right of way and asked for further time to which to complete his negotiations; he asked for sixty days. I submitted his request to Mrs. Morley and it was granted. Mr. Bell was given an additional two months' time in which

to complete his arrangements for taking over the property. Subsequently, on the 22nd of April, 1912, he assumed charge.

"That letter to which you direct my attention, dated November 24, 1911, addressed to Robert G. Bell, was from James D. Lacey & Company to Mr. Bell."

Thereupon said letter was offered and admitted in evidence, without objection, and marked "Complainants' Exhibit No. 5." This letter was dated November 24, 1911, and admitted for the purpose of fixing said date.

"Mr. Bell stated he would rely on our cruise. I asked him on one or another of the interviews we had; while this option was pending we met at different times; I asked him if he had looked over the property, and he stated that he had done so with his foreman. I asked him if he was going to cruise the timber and he said 'No. You are recognized timber cruisers. There is the timber estimate. I rely upon that.' I cannot recall that he stated as the result of his investigations that he believed that number of feet of timber was on the land. During the course of these conversations with Mr. Bell, he made statements to me with reference to the procuring of lands back of this tract. The substance of that was that he desired to procure the Grays River tract, because there was certain of said lands which he expected to acquire, and the Morley lands and the Grays River tract would give him a right-of-way to said lands. I believe that Mr. Bell's negotiations for these lands were being carried on during the life of the option.

"In the capacity of one actively engaged in forestry and matters pertaining to forestry, I have been in it since the spring of 1900 when I entered the Government service. I was engaged in forestry work for the Government for six years, after which I attached myself to the firm of James D. Lacey & Company. I have had general supervision of all the cruising done by my firm. I have spent a great deal of time in the woods cruising, checking cruisers, investigating logging operations, manufacturing, practices in the course of logging business and the reporting upon such propositions. I do not know from my own personal experience whether or not there is any general average of consumption of timber used in connection with the operation of donkey engines in logging, but in the course of business I have had occasion to acquire that information. I have studied many authorities, and I am told that the consumption of wood in the donkey engine varies from 15 to 25 hundred feet a day according to the character of the logging and the dryness of the season; that is, the engine burns more wood in dry weather than it does in wet weather. Generally, the best timber is used in the operation of these donkey engines."

Q. I will ask you to state whether or not in the cruising industry there exists any general practice with reference to the recognition of a standard of variance between the amounts shown by a cruise and the amount of timber which should be removed from land by reasonable, careful methods of logging?

A. "I always figure ten per cent, difference between the amount of timber shown by a cruise and the amount of timber which should be removed from land by reasonable, careful methods, as being a satisfactory test. In our work I do a great deal of rechecking among our own men in order to establish uniformity, and if a piece of timber has been cruised by one of our men and re-cruised by the head cruiser for checking purposes, and if they come within ten per cent. we regard it as satisfactory. If it is more than that the work is done over."

On CROSS-EXAMINATION by Mr. Kollock, of counsel for the defendants, the witness further testified as follows:

"We do a great deal of cruising for prospective purchasers of timber, and have done a great deal in past years. It is hardly a correct statement that our Company is considered, in the community where we operate, as being very conservative cruisers. We are regarded as being estimators who seek to report the actual amount of timber on the ground as it should be removed by reasonable, careful logging. That is the ambition of our business.

"In most logging work oil is favored as fuel, that is, in modern logging. In most logging camps on the Columbia River oil is used as fuel, but I cannot say positively that that is true of all the camps on the Columbia River. I have not seen the operation of the Whiting Timber Company at the mouth of the Columbia River. That is one of the larger operations on the Columbia River at the present time. I have not visited in recent years the operations

on Deep River of the Deep River Logging Company and do not know whether they used wood or oil. I understand that the Portland Logging Company in Wahkiakum County burns oil. I do not know of my own knowledge, for I have not visited the camp. In some cases purchasers who have bought timber by our cruise have shown an overrun and in some cases an underrun. Ten per cent overrun would not be considered a very serious reflection on the ability of James D. Lacey & Company as timber cruisers. I think it would be an excellent showing. Twenty-five per cent underrun is a serious matter, but that is a matter that would depend very largely upon the method employed in removing the timber.

"I know Horatio J. Brown personally and by reputation. His ability and standing as a timber cruiser is good. He was trained in our organization. I would be willing to accept his estimate under ordinary circumstances as to the amount of timber improperly or carelessly and improvidently left upon the tract.

"I first took up negotiations for Mrs. Morley for the purchase of this tract by her in October, 1910, she paying fifteen thousand for this timber."

Q. Then in your letter which has been offered in evidence when you state "If you think it advisable to take charge of this property we urge that you do so, you will be enabled to earn on your investment price within 12 or 15 months." you mean a profit of 100 per cent. on the investment?

A. Less carrying charge.

"I have no recollection of having handed a

copy of that summary to Mr. Bell, but as I say, in the course of business, and anything we had bearing upon the value or character of the property was open for Mr. Bell's examination. We had a good deal of talk relating to the values of the timber and I made it very clear to Mr. Bell at all times that we were selling him so much land for so much money. That we were not undertaking to guarantee our cruise. We never guaranteed any cruise. We simply represent it according to our cruise. That is all we can do, because no man can guarantee a cruise. I have no recollection of Mr. Bell saying to me 'Mr. Langille, it would not be business if I am to buy this property, unless there is twelve million feet, exclusive of hemlock, and if you show to me there is twelve million feet there I will take this at $2.50 a thousand feet,' nor do I have any recollection of having replied, 'You may rest assured that is a fact.' "

THE COURT: That was not his testimony. He says, "we were told he believed it would run out twelve million feet."

"I do not recall that conversation. We might have said to Mr. Bell there was a chance there would be an overrun on that tract."

On RE-DIRECT EXAMINATION the witness further testified as follows:

"A mill purchasing timber does not customarily deduct from the purchase price the amount to be consumed in donkey engines."

On RE-CROSS EXAMINATION the witness further testified as follows:

"When a cruise is made, the old fully grown

and matured timber, yellow fir, a substantial cut is made from the apparent cruise as compared with the regular cruise in young growing timber. It is impossible to say how much of a cut from the normal cruises I would consider should be made in old timber with any degree of accuracy, for the reason that in all our estimating each tree is estimated for what we believe it will hold. If a tree is large and shows some signs of visible defect, that defect may be a stump-rot, may be a dead top, may be away from a railroad; may be where you cannot fell it without breaking it up. There is no way of reducing ten per cent., five per cent. or twenty per cent. from the total upon all the other timber for that would be manifestly unjust. It would not be a proper reduction, to go through a tract and make a cruise from tree to tree carefuly and count them, and at the end make a general deduction from the total, based on the fact that this timber was very old, and that there was noticed more stump rot and more dead, defective timber than would be apparent on the face of it. Such a deduction would not be practical, because no practical man can, from some strip of timber or some trees, determine the amount of defect or the amount of logs which should be taken out on that particular area and then deduct the total loss from the whole tract.

"On the southeast of the southeast of 24, there were only forty acres included in the section on the original cruise. The figures of 332,000 furnished to Platt & Platt, to be included in the specific agreement they were to make, came from our office."

W. G. COLLINS was called as a witness on behalf of the complainants, and in answer to interrogatories propounded by Mr. Montgomery, of counsel for complainants, testified as follows:

"I am Assistant Manager of the Portland office of James D. Lacey & Company. During the years 1910 and 1911, when the transactions involved in this suit were negotiated and consummated, I was a timber cruiser. I cruised about half of the timber involved in the controversy. I had charge of the work of cruising. These memorandum sheets are the original figures showing the cruise upon each quarter of a quarter around this entire tract. The total of each forty is on each one of these sheets. The entries upon these sheets were made by myself at the dictation of the other cruiser for the work that he did and from transcription of my figures for work I did. These transcriptions were made from celluloid tab that we used in the woods."

Thereupon, said documents were offered and admitted in evidence, without objection, with permission to substitute copies later, and marked "Complainants' Exhibit No. 6 and 7."

It is stipulated that these exhibits 6 and 7 contain the entries as above testified to and may be referred to without printing the same, because it is practically impossible to print them so as to be intelligible.

"That cruise was what we call a three man cruise; 100 per cent. In order to do that work, in the first place we established our corners and run the necessary return lines, necessary

section lines and set stakes at stated distances on which to check up the parallel strips. We then set to work and run eight parallel lines across each forty acres and that line we run by a compassman and the cruiser follows this compassman around and estimates all the trees for a distance, or we work one-fourth of a tally, 82,000 feet, on each side of the compass line; eight of these strips in each forty; forty is four tallies long and a tally is 330 feet; so when we get through with work on that line, why, we have reasonably seen every tree and made the necessary estimates from the timber as we see it on the ground. I understand at the time we made the cruise on the timber involved in this suit that it was made for the information of a possible investor. I did not know at that time for what investor. The work done by me as a cruiser in cruising timber involved in this suit was conscientiously done according to recognized and established methods of cruising. The extent of my experience as a cruiser is as follows: I have been working in the woods on the coast for eight years. Since 1907 I have been connected more or less with the firm of James D. Lacey & Company as a cruiser. It is the general custom and practice with reference to the recognition of a standard of variance between the amount shown by a cruise and the amount of timber which should be removed from land by reasonably careful logging methods, it is generally expected, as Mr. Langille stated, that a difference of ten per cent. one way or the other is not unreasonable. I have made an examination of the lands involved in this suit for the purpose of determin-

ing the methods employed by R. C. Bell in removing the timber from the tract described in this case. It was made last week. That would be June 11th, 12th and 13th. These photographs were taken by myself on this Grays River tract during this last examination of the timber there."

Thereupon said photographs, as identified, were offered and admitted in evidence, without objection, and marked "Complainants' Exhibit No. 8."

It is stipulated that this exhibit No. 8 consisting of photographs may be referred to without printing.

"During this recent visit to the property I did not make a detailed cruise. I just made an examination. On this last examination I made a detailed cruise of the standing timber that was remaining in the southwest corner of Section 19. On the rest of the tract the timber had been felled and bucked and most of it removed. I did not make any detailed estimate of the timber left standing on the rest of the tract, but I made a number of estimates, to which I will refer later.

"This first picture (indicating) which I come to here is one of a tree left standing on the southwest corner of Section 19. That tree is ten feet ten inches in diameter and we estimated on a conservative basis that it should contain 40,000 feet; exceedingly large tree (fir). Not far from that tree, perhaps not over what we call a half tally, or 165 feet, from that tree was this stump (referring to photograph) which is standing just over the ridge where this standing timber is and from that stump was felled this tree (indicating)—on the south-

west corner of 19. That tree is left in the woods entirely. I will refer to a memorandum. I have the dimensions of that tree. It was (referring to memorandum) eight feet three inches on the stump. It was felled across this sharp ridge and down into the steep slope and the entire tree left on the ground after it had been felled and bucked; 68 feet from the stump the tree was smashed and the rest of it was ruined. Ten rods, 160 feet, from the stump the tree was still 54 inches in diameter and according to the log scale the tree should have contained 36,000 feet. This picture here (indicating) shows the character of the wind falls that were left. This picture was taken—I am quite positive that was taken on the southwest, on the southwest corner of section 24.

"This picture which I have here (indicating) is a picture of a spruce tree which is on the southwest quarter of the southwest, of section 19. The dimensions of this spruce, all of which was left on the ground—it was 6 feet 2 inches on the butt, and contained, after making a deduction of 25 per cent, for possible defect in the butt log, the entire tree contained 15,300 feet; that was taking it 112 feet in height; in other words stopping before the limbs got too large. This (indicating) is of two spruce; the larger one we estimated to contain 15,000 feet. That was left standing on the southwest of the southwest in section 19. This one (indicating) is taken on the southeast of the southwest of section 19. It shows a spruce tree felled in a steep canyon; in fact, it shows two spruce trees, with cedar falls across it. This picture (indicating) was taken on the southwest of the southwest of

20, and showed the high stump and that particular stump was 72 inches in diameter, and according to our estimates if it had been cut four feet lower, as a conservative logger would have cut it, it would have saved 2,000 feet. This picture (indicating) was taken on the northwest of the northwest of section 29. Shows the character of some of the windfalls left on the ground. We estimated there was three thousand feet left in that tree. This view (indicating photograph) was taken on the southeast of the southwest of Section 19, and shows at the top a large spruce log left on the ground. This picture (indicating) was taken on the northwest of the southwest of Section 20. That particular picture shows two large fir trees. One was felled across a sharp—one tree was on top of the other tree and was broken. I might say that this larger tree was not put where the fellers intended to put it; probably was no fault of the logger. The tree apparently had a heavy leaning and got away from the fallers, but the second tree—upper one—there apparently dropped in that steep gulch. This picture (indicating) was taken on section 29 and is intended to show a spruce stump and a fir stump back in the timber there. Both of those were very large trees and were felled right into the steep canyon. In addition to these pictures, I have a number of estimates—There is another stump on the southeast of the southeast of 19; stump was 7 feet 6 inches in diameter and standing on comparatively level ground and that stump was 6 feet 6 inches high above the roots. If it had been cut about three feet lower, as it should have been, it would have saved

two thousand feet. Also on the southeast of the southeast of 19 there was an eight-foot tree entirely left on the ground, which, according to logging scale, making a proper deduction for some rot on the first log, scaled 27,207 feet. the full volume of that tree would have been 39,000 feet. There was one felled on Section 29, 6 feet at the stump, and contained, according to our estimates, 12,000 feet. Right next to that was another one felled with seven thousand feet left in the top.

"I think the photographs which I have referred to, and which heve been introduced in evidence, constitute a fair average of the conditions that I found upon this investigation. Based upon my experience in the cruising and timber industry, more particularly my experience in the recent investigations about which I have testified, I do not consider that this timber was logged by careful, workmanlike logging methods.

"Based upon my experience, I think it is generally found that the amount of timber consumed by donkey engines will range from fifteen hundred to twenty-five hundred feet a day, depending upon the conditions under which they operate. The character of timber used in the donkeys is necessarily good timber, because in order to make steam they need good live timber. I was going to say there, as far as tops are concerned, where the knots are large, it is impossible to split them. I gave particular notice with reference to the condition of the cedar upon the property along the south line of section 19, just west of quarter post. This investigation was practically entirely in

the southwest quarter of 19. There was a considerable amount of cedar that was practically totally smashed. It was smashed by being dropped down steep side hills, and from an inspection of the stumps, so far as we could see, there had been no use of a wedge, no effort made apparently to save the tree. Wedges are used to fix the direction in which the tree is to be felled. I understand that the market for cedar during the past few years has been very good. I will say, however, that I am not personally in touch with the market. During this investigation an estimate of the amount of good, merchantable timber left standing upon the land involved in this suit, together with the approximate amount consumed in the donkey engines and in camps and elsewhere during the period of operations, was made. The judgment of the man who made the estimate was, that the excess in breakage, amount of timber standing on the ground and the amount of timber consumed in the donkeys would total 3,500,000 and 3,600,000 feet.

"Mr. Bell, during the period of the operation of the lands involved in this suit, did not from time to time make reports of the amount of timber that he was taking from the land."

On CROSS-EXAMINATION by Mr. Kollock, of counsel for the defendants, the witness further testified as follows:

"In stating what is my opinion as to the amount of merchantable timber left on the tract, I can simply repeat what I just said. I could make an estimate eliminating the fuel, saying that the fuel would be from a million

to a million and a half feet. I think that the estimate of Mr. Horatio J. Brown to the effect that 1,200,000 feet is the total of merchantable timber left on the tract is pretty safe. I consider Mr. Brown a competent cruiser and estimator. I have worked with him many years myself. I do not think that the greater part of the photographs which I have shown here were taken on the southwest quarter of section 19. I think a good many of them were, but a number of them I mentioned were taken in section 18, in section 20, and the northwest of 29. All the photographs exhibited showing standing green merchantable timber were taken in the southwest of section 19, southwest corner. In proportion to the number of trees I noticed too many high cut stumps. Whether the stumps were cut higher than normal would be a difference in judgment, and I differ slightly with Mr. Brown in that respect. I cannot remember the number of stumps of that character; 435 trees on that tract. Practically all the merchantable green timber that I found which could have been removed was on the southwest of section 19. I found on that same quarter a considerable amount of timber cut, some of it even bucked, and not removed. That was not practically the only part of the entire tract where I found that condition of timber cut and bucked but not removed. I found in section 20 a more aggravated case. I did not attempt to make a cruise of all the tract, because I have one already made. We have one that was made a year ago. I do not like to make a positive statement as to whether or not the report made by Mr. Brown is correct without being on the ground. I did not

make as full and complete account as shown by Mr. Brown's report. I made the original in the southeast of southeast quarter of 24, and this last time I did not make any examination of that. I could see it was still there. No evidence has been given on the southeast of the southeast of 24. The only knowledge I have as to the consumption of wood as fuel by Mr. Bell or his company is that in all the camps that he is operating at the present time that I visited I noticed the character of the logs that the donkeys were burning. The only camp which I visited is the one in section 29. I do not know what foreman is in charge of that work. I do not know whether he is the same foreman who was in charge when he was operating on the Morley land. The observation of this operation and my knowledge of other operations that I have observed in other camps is the limit of my knowledge as to what is done for fuel. I think most of the up-to-date camps use oil. I do not know the reason why the camps on the Columbia River use oil, and I do not know whether all of them use it or not. I consider the use of oil the more up-to-date method. I think it has been within the past two years that they have been using oil. Prior to three years ago oil was not used in donkey engines. The customary method of firing engines up to that time was with wood. Some of the camps have gone so far as to use electricity, but I think that is not the practice in this country."

On RE-DIRECT EVAMINATION the witness testified as follows:

"Oil and electricity is used in reducing of their cost. In other words, in order to do away with the burning of good timber."

On RE-CROSS EXAMINATION, the witness further testified as follows:

"One of the factors in using oil and electricity is that it reduces the fire risk. That is one of the arguments that is used in reference to the introduction of electricity."

ARTHUR THRANE was called as a witness on behalf of the complainants, and in answer to interrogatories propounded by Mr. Montgomery, testified as follows:

"At the present time I am engaged in cruising, and have been engaged in that business for nine years last past. In conjunction with Mr. Collins I assisted in the cruising of the timber involved in the controversy in this case, known as the 'Grays River Tract.' Referring to complainants' exhibit 6 and 7, will state that I made a cruise of that portion of the timber referred to on said sheets, except a portion cruised by Mr. Collins. I heard the testimony of Mr. Collins this morning regarding the method of cruising in this case. The general scheme of operating as outlined by Mr. Collins in his testimony, as applied to the specific cruise in this case, was correct. The work done by me and Mr. Collins as cruisers upon the timber involved in this controversy was done conscientiously, and according to recognized standards of cruising. There is a practice or custom amongst cruisers, which recognize a standard of variance between the amount of a cruise and the amount of timber which should

be removed from the land by reasonably careful methods of logging. The percentage of variance recognized by that custom or practice would be about ten per cent."

J. E. CROMAN was called as a witness on behalf of the complainants, and in answer to interrogatories propounded by Mr. Montgomery, of counsel for the complainants, testified as follows:

"I am logging down in Tillamook. Have been engaged in the logging business between 18 and 20 years. I logged four years in Lake Superior country, California, Oregon, Washington, Pacific Coast. During the conducting of the active timber operations of Mr. R. C. Bell upon the land involved in this controversy, I went down there and made an examination of the methods of operating that were being carried on by Mr. Bell. I consider their work very poor. There is one large tree there with three breaks in it. It is more or less the fault of the tree, so I did not consider it a poor job. The foreman of the camp stated the only thing he could do was to rush it, and that he was going to jack up the boys a little bit. He also said he was going to jack up the fallers a little bit there. The railroad was wrong in the first place, and necessarily caused more donkeys to be used and they necessarily burned more wood than they should, because it does not pay to fix up for oil on a small tract of timber on that single tract there. Coming up on the train from down there I had a conversation with Mr. Bell. We discussed the thing in general. He said he had a new foreman in there and he thought he would do better. This foreman

I was talking to before we got on the train, but am sure the man can make some difference in the estimate. I made a statement to Mr. Bell at the time regarding the differences which I found. I stated I thought it would cruise up all there was in it, and if they were careful about the management they will get it all out. Mr. Bell is right there now. I think he understood it that way too."

On CROSS-EXAMINATION by Mr. Kollock, of counsel for the complainants, the witness further testified as follows:

"I do not think the land would cruise any more because the timber looked old and defective. I don't like the appearance of the timber, to tell the truth. I think you would have to have pretty competent fallers in there to save it. I ran a camp for seven years and I know I would not have it because they broke it all up. There was nothing to log. I believe they would have to be pretty careful to get more timber out of it than was estimated. I just glanced it over."

All of the large trees were estimated on the high ground and if they were not careful they would break up more than they ought to. That is what I thought of it. Stumps pretty high. Some of the trees 80 or 90 inches across the same. Very incompetent work done in some of it. I saw many of these stumps and called the attention of the foreman to it. I do not remember how many stumps I saw. I looked it over in general. It seemed to me, however, there was no particular attention paid to careful falling at all. They did not pay much attention to it. It would have taken a very

careful logger to have cut out what it cruised. From my experience I believe it would cut out, with careful work, what it cruised, because I know Mr. Collins's work and he cruised it. Very careful methods would have to be exercised to get the timber out of it. That is the only way I could answer that because it was poor falling down.

J. F. KING was called as a witness on behalf of the complainants, and in answer to interrogatories propounded by Mr. Montgomery of counsel for the complainants, testified as follows:

My business is cruising timber, and I have been engaged in that business in the neighborhood of twenty years. I was on the lands involved in this suit the latter part of October, 1913, and was there for the purpose of seeing the general conditions under which the logging was being done. I went down there to ascertain how much timber had been left on the ground, that is, timber that should have been logged, as well as some of the timber that had been felled and bucked and left. I found on the southwest of the southwest of Section 19 in the neighborhood of 375,000 feet to 400,000 feet of timber including green standing fir, dead and down, some spruce and the balance was timber that had been felled and left. I had a conservation with the fallers at the time, on one of the forties they were working on Section 29. The conversation referred principally to the felling of the dead fir trees. That was at the time they were felling them. I thought possibly they might save more than they did, and they claimed that for the time

they might spend in felling it where they might have saved it would be of greater expense than it would be worth to save it. Based on my experience in general as a cruiser, and more particularly on this investigation, I should say that I found places where the ground was very good logging conditions that they had done good work. There are places where they had fallen trees that might have been saved. I made an investigation of this tract with reference to determining the manner of the work that was done upon it. That was last week, the 11th, 12th and 13th. I was showing Mr. Collins, the Assistant Manager of the James D. Lacey Company over the ground, and we estimated some of the timber again; that is, the standing timber on the southwest of the southwest in Section 19. As to timber blown to the ground, there is that amount already stated on the southwest of the southwest and other places along the lines.

I have some general information as to how much timber is consumed as fuel with donkey engines, and would say from a thousand to twenty-five hundred feet a day. We did not make any estimate as to the amount of timber that could have been taken, including in that estimate what was probably used in donkey engines and for camp use. We did not make any detailed estimate. A conservative cruise of a cruiser, according to established practice, should be within ten per cent. of what may be taken off of the land by reasonably careful methods of logging. An estimate of thirteen thousand feet for a tree on the basis of a minimum measure of four feet eleven inches to a

maximum measure of nine feet ten inches as shown by the original cruise in this case is a conservative estimate. From the size of the stumps and the timber that was left on the ground I did not see how it could be that the estimate made by the cruisers would not hold, because while I did not go over the land as thoroughly as Mr. Collins did when he made the original estimate of the lands, still the smallest stump I saw there was four feet eleven inches, from that up to eight feet four inches. The photograph marked "Plaintiff's Exhibit 8" represents a fair average of the condition which we found on that recent investigation. I was with Mr. Collins when he took all of these photographs.

On CROSS-EXAMINATION by Mr. Kollock, of counsel for the defendants, the witness further testified as follows:

The greater part of these photographs were taken on the southwest quarter of Section 19. We took some on 29 as well and on other parts of 19. There were some taken on the southwest, probably half of these were taken on the southwest quarter of 19. I do not remember the measurements of the timber including green trees, logs, dead, breakage, including fir, spruce and cedar on the southwest quarter of Section 19. We estimated the standing trees last week, but we did not estimate the down timber. I took my figures that I had got the first time I was there of the standing timber, including the down that is all dead and down. The total I think was two hundred twenty-five thousand. I think Mr. Collins has an esti-

mate. I think the total cruise made by Horatio J. Brown, which shows on the southwest quarter of 19, green trees left standing, logs, dead, standing and down, and breakage, 538,000 as against the total of 1,214,000 feet for such items on the entire cut over tract, is practically correct. I base my opinion that the cruise should have held out upon an estimate taken practically from the size of the stumps. These were good large size trees, and many of them were matured fully as all fir of that size is. No question but what some of the trees were a thousand years old. A large tree that we estimated was 130 inches in diameter. We knocked off about 18 inches for bark. That would leave 112 inches diameter. There is no question but what that tree, if you could fell it without any breakage, would be 144 feet in length. Instead of that we only allowed 112 and we gave it an estimate of forty thousand feet. There is no question but what that tree would have scaled over sixty thousand feet. We took into account the age of that tree in making this estimate.

On RE-DIRECT EXAMINATION the witness further testified as follows:

This letter dated April 30, 1913, addressed to James D. Lacey & Company, relates to the first trip that I had made down to the lands.

Thereupon said letter was offered and admitted in evidence and marked "Complainant's Exhibit No. 10."

H. G. PLATT was called as a witness on behalf of the complainant, and in answer to interrogatories

propounded by Mr. Montgomery of counsel for complainants, testified as follows:

> At all times since the consummation of the transaction involved in this case and the execution and delivery of this agreement of indemnity to Mr. Bell I have been ready, able and willing to indemnify Mr. Bell against any claim on this property. No claim has ever been made to me, either by Mr. Bell or by his attorney, Mr. Kollock. I have procured a deed to protect Mr. Bell on that property. I mentioned that fact to Mr. Kollock in a conversation on the day I procured it. The purpose of giving him that agreement was in order to leave Mrs. Morley out of any difficulty there was relating to this land. This agreement was substituted in place of it. That was my understanding of it, and I also supposed that it was their understanding of it.

On CROSS-EXAMINATION by Mr. Kollock of counsel for defendants, the witness further testified as follows:

> We got the title to this property last September, I think it was. The title runs to me individually. I do not know whether I have ever served any notice that I was ready to convey that property to R. C. Bell. I would say I served formal notice. Of course, I advised you of it at the time and supposed you understood my purpose in obtaining the deed was to protect the grantor and of course to protect Mr. Bell. I cannot fix the date when I told you about it. My recollection is that it was in the course of a conversation. My recollection is perfectly clear on that except as to the time.

Mr. R. T. Platt might have told you about it over the telephone. I was negotiating for the sale at the time. I never was confident that the property was not right, but did not want the question to be raised. As to whether they had some actual notice of the transaction I have nothing to go on except my impression. I had an impression that these parties had actual knowledge of the timber contract outstanding. Things were said to me and to other people, and I do not know whether they knew anything about it or not. I did not want the question to come up, therefore I got the deed and paid for it. In reference to the two dollars per thousand as the price which Mr. Bell was to pay for the tract, my impression is I got the stumpage figures from the office of Lacey & Company, and where I got the price from I don't know. Might have got it from you. My recollection is that it was for $2.50. It made no difference, however, because our liabilities on the indemnity I considered unlimited in amount, so I did not figure the $2.50 made any difference and was simply a recital.

On RE-DIRECT examination the witness further testified as follows:

In referring to the fact that I thought the parties had notice, I meant that I thought they had notice of the recording of this deed in miscellaneous records so no claim could be raised about it, but I could not have anything definite to go on.

J. P. VAN ARSDALE was called as a witness on behalf of the complainants, and in answer to in-

terrogatories propounded by Mr. Montgomery of counsel for complainants, testified as follows:

I am a logging operator and have been in the timber business for about twelve years. At present I have charge of the logging operations of the Portland Lumber Company and the Coast Range Lumber Company and general manager of the Cathlamet Lumber Company. I made an examination of the tract of timber involved in this suit, known as the Grays River tract, with reference to ascertaining or forming an opinion as to the methods of logging conducted by Mr. Bell. I made an examination last Saturday, the 13th of this month. Mr. King, Mr. Collins and myself went over the lower end of Mr. Bell's road up through Section 24, intersecting the west line of 19 where Myers Creek and the railroad cross that section line. We followed the section line from there up to the southwest corner of Section 19, and before we reached the southwest corner of Section 19 we examined some timber which had been felled and bucked in the head of the draw near the center or west of the center of the southwest of the southwest of 19. By "bucked" I mean that the timber is sawed into logs after it is felled on the ground, sawed into proper lengths. Then we proceeded into the extreme southwest corner of the southwest of the southwest of 19, and I checked up Mr. King's and Mr. Collins' estimate of the standing timber on about 15 acres of land. In that corner the standing timber, both standing and green timber and dead down and dead standing timber was about two hundred fifty thousand feet. This is on the southwest of the south-

west. That was the green timber that had not been felled. We then proceeded up on a line between sections 19 and 30. Along this line we found considerable cedar and spruce and fir that had been felled and not removed. Some of it was bucked and some of it just had been felled. About two tallies, 660 feet, was on the quarter corner between 19 and 30. We proceeded in a northerly direction, crossing the canyon up on the ridge where there had been quite a pile of fir timber. We measured quite a number of stumps on this ridge and proceeded on down into the southeast quarter of the southeast of 19 near the center where we examined some timber that had been felled and bucked and not removed. From this point, continuing on down through the east half of the southeast quarter of 19 to the railroad and Myers creek, and followed the Cambell Lumber Company's logging road from there up into section 20. From the railroad we proceeded up in a northeasterly direction through the southwest of the southwest of 20 and in here we found an area of probably ten acres that was very well logged. The timber had been removed in a workmanlike manner; the felling was good and the ground was cleaned up in good shape. Proceeded east into the northwest quarter of the southwest quarter of 20 and then into the head of the canyon. We found at least 80,000 feet of fine timber that had been left. Followed the quarter down which the logging operation was being carried on to the railroad line, and followed the railroad line, making observations on each side down to the west side of the holdings. Based

upon my experience in the lumber and logging industry, and more particularly upon the investigation of this tract, I have this to say as to the logging methods used on this land; there seemed to be a piece of several acres where the workmanship was good. Again, we ran into ten or twelve acres where it was very poor. It looked as though the work changed hands; that an efficient man was in charge of it up through a period and then an inefficient man. Along the south line of 19 in the southwest quarter we noticed a strip of cedar that was simply felled over into the canyon on the side hill or smashed up. It was a good run of Pacific coast cedar. In the early part of 1911 the cedar market was slack. The latter part of 1911 it was poor. 1912 and 1913 the cedar market was good. As a matter of fact it was easier for us to dispose of cedar than any other product we had.

In the early summer of 1911 I had for some time been interested in the introduction of fuel oil into our logging camps and I made some experiments with fuel oil, also started to make some investigation as to the amount of timber a donkey would burn in an average day's work throughout the season. As a result of these operations I found that the range was from fifteen hundred to twenty-five hundred feet. We have had records where it ran as high as three thousand feet. Based on my knowledge of the amount consumed by donkey engines and the amount generally consumed in camps, and the amount of timber I found remaining on this tract as the result of improper logging I made a general total. I figured conserva-

tively that what was burned in donkey engines throughout the construction period and around camps, and what was left on the ground, that it would amount to three million five hundred thousand feet. This photograph marked "Plaintiff's Exhibit 8" represents some cedar I saw. This photograph is a picture of a couple of spruce trees that I saw on the southwest of of 19. I would consider these photographs a fair general average of the observations we made. From what I saw I did not get the impression that practical logging had been done. The felling and bucking may been left to the fallers and buckers. Could find but very little indication of where wedges had been used in falling the timber. There had been no apparent effort to save certain of the timber. I consider that the work of a cruiser who comes within ten per cent of the actual amount of the timber produced to be very satisfactory work. I know of a case, stating an actual case that during the year 1911—during the year 1910 I made some surveys covering an area that had been logged during that year. We found the timber had fallen down 18 per cent, due to defective felling and bucking and poor workmanship. The Portland Lumber Company, which I represent, have logged our tracts in the vicinity of this Grays River tract. They were practically identical and the general grade of the timber is the same. I have known Mr. Brown since the fall of 1908. He has the reputation of being a good cruiser, a conservative cruiser. As a logger I know that his knowledge would be superficial. He never had charge of logging operations.

I will explain what I mean by the use of wedges. In this large timber in the west we have to contend with a rough broken ground, we have found by observation that very few trees are straight, and while they are not straight they lean in one direction and the tree can be felled in three directions; that is, it can be felled at right angles or the way it leans or between these points. Each gives advantage for the use of wedges to raise it. I was impressed of the small amount of wedging by the appearance of the stumps on the tracts in suit. Bedding means when they are felling large trees across a depression—in advance of that they fell small trees on the ground where the big tree is going to fall. I could not see any bedding on this tract. The effect of bedding keeps the trees from breaking when they hit the ground.

On CROSS-EXAMINATION by Mr. Kollock, counsel for the defendants, the witness further testified as follows:

I specified in the picture of the standing green trees that that was only timber in the southwest quarter of 19. I recollect three photographs of the standing and another picture of the down timber taken in the southwest of the southwest of 19. I think there were a couple of cedar trees and a spruce tree or two throughout the rest of the tract. To all intents and purposes the green timber is found on that same southwest of the southwest of 19. Our timber operations are very large and more desirable logging than the tract in suit, but when we first started in to work and for some

time it was somewhat similar to that of Mr. Bell's; it was broken ground. I do not consider the tract in suit good logging show for the main average of our tracts, but we have considerable land. Our fir is the same kind of fir as on Mr. Bell's land. It is practically the same growth of timber. On the southeast corner of our tract in 25 in the same township and range we have some young timber, haven't reached that yet. I do not know the amount of cedar that was on the entire tract involved in this suit. Most of the cedar was in southwest corner of 19. I have no actual knowledge of the cost of Mr. Bell's operation relative to the consumption of wood for fuel. My testimony is based on my general knowledge in the matter. Two of our camps have oil equipment. Poulson's have oil in their camps, also Hamlin Lumber Company. We did our experimental work in the summer of 1911 and in the fall. Clark Wilson Logging Company installed oil in their donkeys and in the spring of 1912 we installed oil, and have been using it since in all except the Cathlamet camp. The first introduction of oil as fuel in that territory was our own experiment which led to the installation of oil as a fuel. I did not make an aggregate complete estimate of the green trees and logs cut and bucked or the standing and down dead trees and the avoidable breakage on the southwest quarter of section 19. I went through the southwest quarter as I have outlined on my trip through there. I estimated the timber that had been in this strip and went into the canyon lower along the west line where apparently most of the timber left was there.

The amount of 538,000 feet that Mr. Horatio Brown said he found on the southwest of the southwest is approximately correct. Mr. Brown would be absolutely honest in his estimation of what was on there, and whether his judgment would be good as to what should be taken out or not I question it. I would not question his abiltiy or honesty but would question his judgment as to what should be taken out. This would be from point of view of an actual logger. It would be based on the fact that he had not been engaged in the logging business.

On RE-DIRECT EXAMINATION the witness further testified as follows:

The reason for the installation of oil is that in the first place it was as a matter of economy to save our timber, because I found by experience that they used the best logs that we have in the woods, unless occasionally they get some that have three or four pitch rings. It kept them busy putting in enough fuel for the fires. I found on our operations that I could pay for the oil with the timber we used, the expense of logging it, etc., therefore we saved the labor, and the last reason for using it was for fire protection and the elimination of that risk. There was a saving, as I found in my operations, of one hundred per cent.

On RE-CROSS EXAMINATION, the witness further testified as follows:

I consider the three elements would be of equal importance.

At this point in the proceedings, counsel for the complainants and defendants stipulated in open

Court that the question of the amount of attorneys' fees should be left to the Court, and also stipulated that the ruling of the Court would be valid as to the question of attorneys' fee.

Thereupon complainants offered in evidence a letter dated at Portland, Oregon, April 30, 1913, from J. Frank King to James D. Lacey & Company, in reference to investigations made relative to the Grays River tract involved in this suit, which said letter was admitted in evidence and marked "Complainants' Exhibit No. 10," to the introduction of which exhibit defendants objected, on the ground that the same was incompetent, irrelevant and immaterial.

H. C. BELL was re-called as a witness on behalf of the defendants, and in answer to interrogatories propounded by Mr. Kollock of counsel for the defendants, testified as follows:

> One of the foremen who had charge of the operations of the Morley tract was the same as one who had charge of the operations on the tract of land located immediately beside that. About 75% of the crew was the same, generally old-timers. Our general orders were not to use good timber for fuel, because there was much bad timber of that class of timber and plenty good enough for wood, and in this Grays River tract we had more wood than we needed, and there was no occasion to use good timber, therefore it was not used. I was on the ground personally every week, and I never observed a good log there at the dump. We hired an extra wood cutter to pack up the wood. It

took more sawing than it would if we had good clean stuff, and that is why we hired an extra man. That procedure held out through our entire operations. I do not think there was a million feet, or any amount that would have been merchantable logs used there as fuel. It was quite difficult to go to the southwest of the southwest of 19. There was not very much there, and this timber right adjacent to the forty acres was so that we could not take it, so we had to leave it. Too expensive to operate there. If we had been able to log timber on the southeast of the southeast of section 24 it might have been profitable to have handled timber on the southwest of the southwest of 19. It would need another engine for that. As a matter of business we did not consider it advisable to log the southwest of the southwest of 19. Our instructions to Brown & Brown were to make a complete report of everything that might have been taken out at all, to find out what was left that would have been merchantable. The cruise of James D. Lacey & Company was for three hundred thousand feet of cedar. That was the total they reported, three hundred thousand feet, of which we could sell one hundred sixty-five thousand. The shortage on the cedar under the cruise would be one hundred thirty-five thousand. For one lot of cedar which we sold with the fir we got as high as twelve dollars; the balance ranging at ten dollars. Our actual average logging expense, including all items of actual logging operations and rafting, but not including overhead expense and construction, ran between $4.00 and $4.50 a thousand. If all the cedar had been

taken out, as shown by the original cruise, the total amount would have been about $450. We had good fallers and they used wedges, as all fallers do. The records show that there was a great deal of stuff that was broken. What was broken could not have been saved by wedges. Wedges were used. Lots of timber would have been too heavy to use wedges, and the defect in it would cause the tree to break before it could be held up. Those trees were very heavy. In our operations on timber we have bought we have operated by the same method and have handled our donkeys in the same manner that we did on this tract.

Q. What if the fact as to allowing for such timber as may have been used for fuel and the breakage and stuff in that case in the case the purchase had developed into an under run?

A. Over run.

Q. After taking into account timber that could be consumed for these purposes?

A. Yes, it was shown that we are not to use good logs, consequently we did not use them. But there was always an over-run anyway.

Now, within the time allowed by, the defendants present this, their Statement of the Evidence, and pray that the same be approved.

KOLLOCK & ZOLLINGER,
Attorneys for Defendants.

Due service of the within Statement of the Evidence is hereby admitted in Portland, Oregon, this 9th day of December, 1914, by receiving a copy thereof.

PLATT & PLATT,
Attorneys for Plaintiffs.

The above statement of the evidence having been duly served, lodged with the Clerk of this Court and present for settlement and approval within the time allowed by law, and being found to be true, complete and properly prepared, the same is now and hereby approved.

Done in open court this 12th day of January, 1915.

EDWARD E. CUSHMAN,
United States District Judge.

(Endorsed):

"FILED IN THE
U. S. DISTRICT COURT
Western Dist. of Washington,
Southern Division,
DEC. 10, 1914.
FRANK L. CROSBY, Clerk.
By E. C. Ellington, Deputy."

Stipulation (as to Summary of Argument of Counsel for Defendants).

It is hereby stipulated that the summary of the argument of counsel for defendants, and the oral findings and decision of the court, are substantially as follows, to-wit:

Summary of Argument of Counsel for Defendants.

At the close of the evidence, of counsel, for defendant, made the following statement in his argument to the Court on the law and facts involved in the case:

"We admit the execution of the note. We admit there is a certain balance due upon that note, and it is a fact as alleged in the complaint. We admit

we have not paid it. Unless we can show we are entitled by way of counterclaim, either by reason of the shortage in the timber, misrepresentation as to the amount of timber on the tract, or by reason of the failure or total inability of the complainant to convey what they purported to convey by the deed, or bargain of sale, which is in evidence, we must fail.

"Counsel submitted to the court last evening a brief to which reference was made in his early argument on the proposition as to the items which are essential in an action for deceit. I have no quarrel with that proposition of law. It is too well established; even for consideration, in an action at law for deceit that it is necessary to have not only the false statement but the knowledge that it was made with intent to deceive, and that at the time it was made the party making it knew it to be false or that it was made with such gross carelessness as to the truth as to be constructively fraudulent.

"Nor have I any quarrel with the statement that the same rule applies to a defense as against an action for the purchase money on the sale of personal property or land. I would say that we have not alleged here intentionally any actual fraud on the part of James D. Lacey & Company and cannot now charge any such fraud. We attempted to draw our pleadings and present the case as we thought the facts to be, neither the defendant nor myself, as his attorney, believed there was any actual fraud on the part of James D. Lacey & Company, particularlq on the part of Mr. Langille, their representative and manager.

"It might be that a shortage of 25 per cent. from the figures given as the timber on the land would be false in an action at law for deceit or in the de-

fense to an action for the payment of purchase money, based on the same theory of such gross recklessness as to the true facts of the case. The law may then regard that, as a conclusion of law, as fraudulent.

"The testimony here shows, and I presume it is a matter of common knowledge, that no logger could operate on a shortage of 25 per cent or 20 per cent from the estimate on which he purchased the property and that a company with the reputation of James D. Lacey & Company, and their business, if it be true that their cut underruns 25 per cent or 20 per cent in this particular case would be chargeable with such gross disregard as to whether or not the facts are true which are stated, that it might be held as fraud in law, but I disclaim any intention to charge actual fraud, or actual intention to deceive on the part of that company."

Court's Oral Findings (Decision).

"If I had any doubt about this proposition I should take the time to examine into the case, and these exhibits, but with the work I have on hand, with no such a doubt troubling the court, I shall decide the case now.

I find there was no representation of the fact made by Mr. Lacey on behalf of the plaintiffs in this case, regarding the amount of timber there was on this land. The only representation of fact made was that the cruise had been made of the land, timber on the lands, for the purpose of purchase when the Morleys acquired the lands; coupled with the expressed opinion, when asked how much it would over-run the cruise, that it would run as much as twelve million feet.

There being no direct and positive representation of fact as to the amount of timber on the land, the Court must go further and see what other things are involved in the case.

Counsel in his closing argument appeals to the standing of these people as cruisers. There was not any such confidential relation existing between the defendants Bell and the Lacey Company (James D. Lacey & Company), as to warrant Bell in placing any particular reliance on the expression of their opinion as he would upon the opinion of somebody he had hired or his own agent.

There is no evidence to support a finding that the expression of belief was so reckless and grossly exaggerated as to warrant the court in finding there was actual intent to deceive.

Then we come to this cruise upon which he bases his opinion and the evidence in the case seems to indicate that it was made according to the accepted method of cruising by men who are unimpeached and who are experienced, and the court finds that there is nothing in the case to warrant the assumption that Mr. Langille was careless in expressing that opinion, let alone the court being able to find that it is clearly and satisfactorily established as asserted that there was fraud. A mere preponderance of the evidence is not sufficient where fraud is charged or something tantamount to fraud.

Now coming to the other features of the case, to the title. There are many questions involved in that, regarding implied and expressed covenants and the question whether the statutes of Oregon and

Washington should control, but the court is clearly of the opinion that when the bond was entered into by these people, either at the same time or subsequent to the giving of the deed—and it does not make any difference which—that that bond undertook to handle the situation because it was expected that the liability of the parties would be determined by the arrangement made with these two instruments; we have to consider these two transactions, the bond and the deed, as binding as one. It is perfectly plain what was in the minds of the parties. Both of them were anxious to trade. Mr. Bell did not want to wait. He was losing time, and the parties did not want to bind themselves absolutely on something they did not know whether they could make good in this deal. This bond was made in the alternative, that they would either make good that deal, or in the event they would not be able to do it they would necessarily indemnify Mr. Bell and his company.

Now under that arrangement there could not be any breach of this agreement until such time as he was actually ousted. These parties put him in possession of the land and he was not ousted.

The bond of indemnity was absolute. The defendants did not call upon the bondsmen to indemnify them; did not seem to make any question upon that or to ask for additional indemnity or any new bond.

The court is clear that the plaintiffs should recover and find as a reasonable attorneys' fee five

hundred dollars. Fndings, decree and conclusions may be prepared and entered."

PLATT & PLATT,
Attorneys for Plaintiffs.
KOLLOCK & ZOLLINGER,
Attorneys for Defendants.

(Endorsed) :—

"FILED IN THE
U. S. DISTRICT COURT,
Western Dist. of Washington,
Southern Division,
JAN. 12, 1915.
FRANK L. CROSBY, Clerk.

By E. C. Ellington, Deputy."

Findings of Fact and Conclusions of Law.

This cause having come on for trial on the 15th day of June, 1912, complainants appearing by Mr. Hugh Montgomery of Platt & Platt, their solicitors of record, and defendants appearing by Mr. J. K. Kollock of Kollock & Zollinger, their solicitors of record, and the complainants having introduced evidence, both oral and written, and the defendants having introduced evidence, both oral and written, and the cause having been fully argued and submitted, and the court being now fully advised, makes the following Findings of Fact and draws therefrom the succeeding Conclusions of Laws:

I.

That at all times mentioned in the bill of complaint filed in the above entitled suit, complainants were and still are husband and wife, and both citi-

zens, residents and inhabitants of the state of Michigan, residing at Lapeer, in said state.

II.

That at all times mentioned in the bill of complaint herein filed in the above entitled suit, defendants were and still are husband and wife and both citizens, residents and inhabitants of the state of Oregon, residing in the city of Portland, said state.

III.

That this is a suit between citizens of different states, to-wit: between complainants, citizens, residents and inhabitants of the state of Michigan, and defendants, citizens, residents and inhabitants of the state of Oregon, and is a suit to foreclose a mortgage in favor of the complainants and executed and delivered to the complainants by the defendants upon real property within the Western District of Washington, Southern Division.

IV.

That on the 22nd day of April, 1912, the defendant R. C. Bell, for a valuable consideration, executed and delivered to complainants his promissory note in writing, of which the following, in words, letters, and figures, is substantially a copy, to-wit:

"$5625.00. Portland, Oregon, April 22nd, 1912.

> On or before twelve (12) months after date, I promise to pay to the order of Mary E. C. Morley and Fred Morley five thousand six hundred twenty-five dollars for value received, with interest from date, payable at maturity at the rate of six (6%) per cent per annum, until paid, principal and interest payable in U. S.

gold coin, at Lumbermen's National Bank of Portland, Oregon; and in case suit or action is instituted to collect this note or any portion thereof, I promise to pay such additional sum of money as the court may adjudge reasonable as attorney's fees in such suit or action.

(Sd.) R. C. BELL."

V.

That no part of said indebtedness has been paid, either principal or interest, except $120.93 on account of interest thereon paid May 26th, 1913, and there is now due and owing thereon from the defendant R. C. Bell to the complainants the full sum of five thousand six hundred twenty-five ($5625), with interest thereon at the contract rate of six per cent per annum from April 22, 1912, less a credit of $120.93 on account of interest thereon paid May 26th, 1913.

VI.

That Five Hundred Dollars ($500) is a reasonable sum to be allowed complainants as attorneys' fees in the above entitled suit.

VII.

That at the time of the execution of said note the defendants were the owners of the following described real property, and to secure the payment of said not, both principal and interest and attorneys' fees, the defendants executed and delivered to the complainants their indenture of mortgage, in writing, covering all of that certain real estate situate in Wahkiakum County, State of Washington, and described as follows, tc-wit:

(a) Lots two (2), three (3), and four (4), and the southeast quarter of the northwest quarter and the east half of the southwest quarter, and the southeast quarter of section nineteen (19); the west half of the southwest quarter of section twenty (20); and the northwest quarter of the northwest quarter of section twenty-nine (29); all in township ten (10) north, range seven (7) West of the Willamette Meridian;

(b) Also all the timber standing, growing, lying and being on the southeast quarter of the southeast quarter of section twenty-four (24); in township ten (10) north, range eight (8) west of the Willamette Meridian, together with the right to remove said timber at any time within twenty (20) years from the eighth day of August, 1906, and together with the right to build, operate and maintain railroads, skidroads, telephone lines, or other devices, over and across said described land and necessary or convenient to remove said timber therefrom.

(c) Also that certain right of way conveyed by G. K. Durrah and Clara Durrah, his wife, under date of January 15th, 1912, for fifteen (15) years, in language following, to-wit:

'A right of way twelve feet wide, over our land for a railroad, commencing about five hundred feet above the County Road on bank of Grays River, running from this starting point and curving until a straight line can be had along the fence; thence straight up the fence line, until the point of crossing the County Road into the lands of W. C. Kessell is reached, at which point a suitable curve will have to be made to make the County Road crossing.

We also grant a privilege of using the river bank as a rollway.'

(d) Also a right of way granted by W. C. Kessell and Mary Kessell, his wife, under date of January 15th, 1912, for ten (10) years, in language following, to-wit:

'A right of way for a railroad over our land, situated near Grays River, Washington, width of right of way over said ground fifteen feet. Work shall begin within sixty days from date of this lease. The grantee may go over any portion of the land desired, and agrees to remove any gravel that may be used for a roadbed through the hay field.'

(c) Also a right of way granted by Jacob W. Haynes and L. C. Haynes, his wife, under date of January 16th, 1912, for ten (10) years, in language following, to-wit:

'A right of way for a logging railroad over the following described land, SW¼ of the NE¼ of section 19, T. 10, R. 7. Work to start within sixty days from date. Logging road to follow left hand side along foot hill.'

Together with the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, which said indenture of mortgage was executed, witnessed and acknowledged so as to be entitled to record, and was thereafter and on the 27th day of July, 1912, duly recorded in the records of mortgages of Wahkiakum County, Washington, in Volume 1, page 88, where at all times since it has remained of record, wholly unsatisfied, except that all indebtedness therein described has

been paid except that sought to be recovered in this suit.

VIII.

That on or about the 7th day of July, 1913, the above entitled court issued a temporary restraining order restraining the defendants above named, and each of them, and each of their agents, servants, employes and representatives, from selling, conveying, incumbering or removing from the County of Wahkiakum, State of Washington, a million and a half (1,500,000) feet of saw logs which said defendant, R. C. Bell, had removed from the lands described in Paragraph VII. of these Findings of Fact and Conclusions of Law, and on the 7th day of July, 1913, the above entitled court made and entered an order requiring the defendants, and each of them, to show cause why an injunction should not be issued enjoining the above named defendants, and each of them, their agents, servants, employes and representatives, from selling, conveying, incumbering or removing from the County of Wahkiakum, State of Washington, said saw logs which had been removed by the defendant, R. C. Bell, from the real property described in Paragraph VII. of these Findings of Fact and Conclusions of Law, and on or about the 12th day of July, 1913, the complainants and defendants in the above entitled suit, acting through their respective solicitors of record, entered into a stipulation in writing wherein and whereby it was provided that the defendants might file in the above entitled court a bond in the sum of Seventy-five Hundred Dollars ($7500) given

by R. C. Bell, defendant above named, as principal, and American Surety Company of New York, a corporation, duly incorported, organized and existing under and by virtue of the laws of the State of New York, as surety, conditioned that in consideration of the release of the said saw logs from the inhibition of said temporary restraining order theretofore issued in the above entitled cause, the said principal and surety would abide by and pay or comply with any judgment and decree that might be entered in the above entitled suit in favor of the complainants and against the defendants, and that judgment and decree might be rendered likewise against the American Surety Company of New York as well as said defendants, and that the above entitled court should have jurisdiction in any decree that might be rendered in favor of the complainants and against the defendants, to include in said decree a judgment against the principal and surety on said bond, without the necessity of the complainants herein bringing action upon said bond in another proceeding, and in pursuance of said stipulation and on or about the 12th day of July, 1913, a bond was executed by the said defendant, R. C. Bell, as principal and the said American Surety Company of New York as surety, wherein and whereby it was provided as follows:

> "WHEREAS, in consideration hereof a stipulation has been entered into by and between the said mortgagees, the complainants in said suit, and said mortgagors, the defendants in said suit, acting by their respective solicitors of

record, wherein and whereby in consideration of the modification of said temporary restraining order and an order of court thereon relieving said saw logs from the inhibition of said temporary restraining order, and the turning over of said saw logs to the defendants, the principal and surety herein agree to and with the complainants herein that in the event that a judgment and decree is entered in said suit in favor of the complainants and against the defendants, the said judgment shall be likewise rendered against the surety herein, as though it had been a party defendant to such suit and to the obligations sought to be enforced therein, it being the intent and purpose of this bond that the liability of said surety shall take the place of and be in lieu of said mortgaged property released from the inhibition of said temporary restraining order.

"The liability of the principal and surety hereunder shall continue until and including final judgment and decree in the said suit and satisfaction thereof."

IX.

That at no time during the transactions involved in the above entitled suit and at no time prior to the consummation of the sale and transfer of the lands involved in the above entitled suit, or any portion thereof, from the complainants to the defendants, did the complainants or any person or persons acting for them or on their behalf, make any false representations as to the amount of timber upon the lands involved in this suit, or any portion thereof, or make any fraudulent representa-

tions of any character as to said lands or the amount of timber upon said lands.

X.

That the real property described in Paragraph VII. of these Findings of Fact and Conclusions of Law was conveyed by the complainants to the defendants by deed of conveyance on the 22nd day of April, 1912, and recorded in Volume I. of the Records of Deeds of Wahkiakum County, Washington, page 101, and that at the time of the execution and delivery of said deed of conveyance from the complainants to the defendants, and contemporaneously therewith, there was executed and delivered to the defendants an agreement of indemnity wherein and whereby it was agreed that Harrison G. Platt and Robert Treat Platt should either obtain a deed or deeds sufficient to convey to the defendant above named, R. C. Bell, the timber standing, growing, lying and being on the Southeast quarter of the Southeast quarter (SE¼ of SE¼) of Section twenty-four (24), Township ten (10) North, Range eight (8) West of the Willamette Meridian, in Wahkiakum County, State of Washington, together with the right to remove said timber at any time within twenty years from the 8th day of August, 1906, together with the right to build, operate and maintain roadways, skidways, telephone lines, or other devices over and across said described land and necessary or convenient to removing said timber therefrom, or else protect and save harmless the said R. C. Bell against any damages, charges or expenses which he might incur or suffer by reason

of cutting or removing said timber, which said agreement of indemnity was accepted by the defendants in lieu of any covenant of siesin or title in the deed of conveyance of said timber from said complainants to said defendants, and the said Harrison G. Platt and Robert Treat Platt have since the date of the execution and delivery of the deed of conveyance of said property from said complainants to said defendants, procured a deed perfecting the title to the real property described in this paragraph, for the benefit of the defendant, R. C. Bell, and that said defendants, or either of them, have not suffered any damages, charges, or expenses by reason of cutting or removing said timber, or attempting to cut or remove any of said timber, and should be estopped from alleging or attempting to allege, claiming or attempting to claim, recovering or attempting to recover any damages on account of any alleged defect in title to the said described real property.

XI.

That no suit or action is pending or has been brought by the complainants for the collection of said indebtedness, or any part thereof, and the amount involved in the above entitled suit exceeds the sum of Three Thousand Dollars ($3000) exclusive of interest and costs.

Conclusions of Law.

I.

That by reason of the premises, the complainants are entitled to a judgment against the defendant R. C. Bell and American Surety Company

of New York, a corporation duly incorporated, organized, and existing under and by virtue of the laws of the State of New York, for the purpose of engaging in the surety business, and by compliance with the laws of the United States and of the State of Washington, authorized to engage in the surety business in the State of Washington, and each of them, for the sum of Five Thousand Six Hundred Twenty-Five Dollars ($5,625) with interest thereon at the contract rate of six per cent, per annum from April 22, 1912, less a credit of One Hundred Twenty and 93-100 Dollars ($120.93) on account of interest paid May 26, 1913, and the further sum of Five Hundred Dollars ($500) attorneys' fees, and their costs and disbursements herein incurred in the above entitled suit.

II.

That complainants are entitled to a decree of foreclosure foreclosing the defendants, and each of them, and all persons claiming or to claim by, through, or under them or either of them, of and from all right, title, and interest in and to said mortgaged real property described in said mortgage mentioned in Paragraph XII of these Findings of Fact and Conclusions of Law.

III.

That complainants are entitled to an order directing the sale of said real property described in Paragraph VII. of these Findings of Fact and Conslusions of Law, as upon execution at law,

which said order shall provide that the proceeds of the sale of said property shall be applied to the costs and expenses of such sale, to the costs and disbursements incurred by the complainants in this suit, to the payment of attorneys' fees allowed complainants by the court, and to the payment of the sum found to be due the complainants herein, Mary E. C. Morley and Fred Morley, her husband, on said note, and which said order shall allow the complainants to become purchasers thereof.

IV.

That if there be a deficiency arising from the sale of said mortgaged property, that judgment therefor shall be docketed against the defendant, R. C. Bell and against said American Surety Company of New York, and each of them.

Order (Dated June 27th, 1914).

Whereas, the Findings of Fact and Conclusions of Law and the Decree in the above entitled case were signed by the Court on the 22nd day of June, 1914, and the court being fully advised in the premises, it is now

ORDERED that said Findings of Fact and Conclusions of Law and said Decree in the above entitled case be amended to read as signed as of this date, to-wit: the 27th day of June, 1914.

Dated this 27th day of June, 1914.

EDWARD E. CUSHMAN, Judge.

(Endorsed):—

"FILED IN THE
U. S. DISTRICT COURT
Western Dist. of Washington
Southern Division,
JUNE 27 1914
FRANK L. CROSBY, Clerk.
By F. M. Harshberger, Deputy."

Objections of Defendants to Findings of Fact and Conclusions of Law.

Come now the defendants and each of them by John K. Kollock, their attorney, and object and except to each of the proposed findings of fact and conclusions of law submitted by complainants, which are hereinafter mentioned and referred to, and move the court to strike out the same and to substitute in lieu thereof the findings of fact and conclusions of law hereinafter specified.

1. The defendants object and except to finding of fact numbered VIII., for the reason and on the ground that the same is not complete, is not founded on any evidence submitted by the plaintiff or defendant, and is not within the issues of this suit, and move the court to substitute therefor the following:

VIII.

That on or about the —— day of ——, 1913, the above entitled court issued a temporary restraining order, restraining the defendants above named and each of them and each of their agents, servants, employes and representatives from selling, conveying, encumbering or removing from the County of Wah-

kiakum, State of Washington, 1,500,000 feet of sawlogs claimed to have been removed by the defendant R. C. Bell from the lands described in paragraph VII of these findings of fact and conclusions of law, and on the 7th day of July, 1913, the above entitled court made an order requiring the defendants and each of them to show cause why an injunction should not be issued enjoining the above named defendants and each of them, their agents, servants, employes and representatives from selling, conveying or removing from the County of Wahkiakum, State of Washington, said sawlogs, and on or about the —— day of ——, 1913, the complainants and defendants in the above entitled suit, acting through their respective solicitors of record, entered into a stipulation in writing, in words and figures substantially as follows, to-wit:

"WHEREAS, this is a suit to foreclose a mortgage upon real estate and interest in real estate, as described in the complaint, and upon sawlogs cut from timber on said real estate and interest therein; and

WHEREAS, heretofore and on the 7th day of July, 1913, the Honorable Judge of the above entitled court made and entered an order requiring the defendants and each of them, to show cause on the 14th day of July, 1913, at the hour of 10:00 o'clock in the forenoon, why an injunction order should not be issued herein, enjoining the defendants, and each of them, their agents, servants, employes and representatives from selling, conveying, encumbering or removing from the County of Wahkiakum, in said district and division, one and

one-half million feet of saw logs described in the complaint, and during the pendency of said order to show cause, the defendants, and each of them, and each of their agents, servants, employes and representatives in charge thereof, or any part thereof, be restrained from selling, conveying, encumbering or removing from the said County of Wahkiakum, the said sawlogs, or any part thereof.

NOW THEREFORE, IT IS HEREBY STIPULATED by and between the complainants above named, acting by Messrs. Platt & Platt and J. O. Bailey, their solicitors of record, and defendants, acting by Messrs. Kollock & Zollinger, their solicitors of record, that upon the execution and filing in the above entitled court of a bond in the sum of seventy-five hundred (7500) dollars, signed by defendant R. C. Bell, as principal, and American Surety Company of New York, a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of New York, for the purpose of engaging in the surety business, and compliance with the surety laws of the State of Washington and of the United States, authorized to act as surety in the State of Washington, as surety, conditioned that in consideration of the release of said sawlogs from the inhibition of said temporary restraining order, the said principal and surety will abide by and pay or comply with any judgment or decree that may be rendered in the above entitled suit in favor of the complainants and against the defendants, and that judgment and decree may be rendered likewise against said American Surety Com-

pany of New York as well as against the defendants, and that in such case, and such case only, an order may be entered herein releasing from said temporary restraining order the said sawlogs.

It is the purpose and intent of this stipulation that the said bond shall stand in the place and stead of said mortgaged property released, and that the above entitled court shall have jurisdiction in any decree that may be rendered in favor of the complainants and against the defendants to include in said decree a judgment against the principal and surety on said bond without the necessity of the complainants herein bringing action upon said bond in another proceeding. Nothing herein shall be construed as inhibiting any of the parties hereto from appealing from any decree rendered by the above entitled court to the Circuit Court of Appeals of the United States, for the Ninth Circuit, and during the pendency of such an appeal and until the conclusion thereof, the said bond shall continue in full force and effect, and the same judgment and decree may be rendered against said principal and said surety in said appellate court, or upon any retrial of said cause in the above entitled court, in case said appellate court or this court shall decide the issues in this cause in favor of complainants and against defendants,"

And in pursuance of said stipulation and on or about the —— day of ——, 1913, a bond was executed by the defendant, R. C. Bell, as principal, and the said American Surety Com-

pany of New York, as surety, in words and figures substantially as follows:

* * * * * * * *
* * * * * * *
* * * * * * * *
* * * * * * *
* * * * * * * *

Bond.

WHEREAS, R. C. Bell and Mary A. Bell, on the 22nd day of April, 1912, executed and delivered to Mary E. C. Morley and Fred Morley, her husband, their mortgage upon certain land and standing timber and interest in land in the County of Wahkiakum, State of Washington, which said mortgage was so executed and acknowledged as to be entitled to record, and was recorded on the 27th day of July, 1912, in the records of mortgages of Wahkiakum County, State of Washington, in Volume I., page 88, where at all times since it has remained of record and unsatisfied as to the indebtedness hereinafter referred to, and

WHEREAS said mortgagees have filed in the United States District Court for the Western District of Washington, Southern Division, a suit to foreclose said mortgage against the property therein described and certain timber cut therefrom and within the jurisdiction of said court, and

WHEREAS, heretofore and on the 7th day of July, 1913, the honorable Judge of the above entitled court made and entered an order requiring the defendants, and each of them, to show cause on the 14th day of July, 1913, at the hour of 10:00

o'clock in the forenoon, why an injunction order should not be issued therein, enjoining the defendants, and each of them, their agents, servants, employes and representatives from selling, conveying encumbering or removing from the County of Wahkiakum, in said district and division, one and one-half million feet of saw logs described in the complaint, and during the pendency of said order to show cause, the defendants, and each of them, and each of their agents, servants, employes and representatives in charge thereof, or any part thereof, be restrained from selling conveying, encumbering or removing from the said County of Wahkiakum, the said sawlogs, or any part thereof,

NOW THEREFORE, R. C. Bell, one of the said defendants, as principal, and American Surety Company of New York, a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of New York, for the purpose of engaging in the surety business, and by compliance with the laws of the United States and the State of Washington, authorized to engage in the surety business in the State of Washington, as surety, are held and firmly bound unto Mary E. C. Morley and Fred Morley, in the sum of seventy-five hundred dollars ($7500).

The condition of this obligation is such that

WHEREAS, in consideration hereof a stipulation has been entered into by and between the said mortgagees, the complainants in said suit, and said mortgagors, the defendants in said suit, acting by their respetcive solicitors of record, wherein and

whereby in consideration of the modification of said temporary restraining order and an order of court thereon relieving said sawlogs from the inhibition of said temporary restraining order and the turning over of said sawlogs to the defendants, the principal and surety herein agree to and with the complainants herein that in the event that a judgment and decree is entered in said suit in favor of the complainants and against the defendants, the said judgment shall be likewise rendered against the surety herein, as though it had been a party defendant to such a suit and to the obligations sought to be enforced therein, it being the intent and purpose of this bond that the liability of said surety shall take the place of and be in lieu of said mortgaged property released from the inhibition of said temporary restraining order.

The liability of the principal and surety hereunder shall continue until and including final judgment and decree in the said suit and satisfaction thereof.

Nothing herein shall be construed as prohibiting either party to such suit from appealing the same to the United States Circuit Court of Appeals for the Ninth Circuit.

IN WITNESS WHEREOF, the principal above named has hereunto set his hand and seal, and the said surety has hereunto set its corporate name and seal by its proper officers thereunto duly authorized this 12th day of July, 1913.

(SEAL) .....

AMERICAN SURETY COMPANY
OF NEW YORK.

By.....

By.....

2. Defendants object and except to finding of fact numbered IX. on the ground and for the reason that it is not sustained by the evidence in the above entitled suit and move the court to substitute therefor the following:

IX.

That the mortgage referred to and described in paragraph VII. of these findings of fact was executed and delivered by the defendants as part of the purchase price of the real property therein described, the same having been conveyed to the defendants by deed of complainants made, executed and delivered April 22, 1912, and recorded July 31, 1912, in Volume I. of the Record of Deeds of Wahkiakum County, Washington, at page 101; that the total consideration moving to the complainants was the sum of $30,000, of which $7000 was paid in cash and the balance in and by the execution and delivery of the mortgage described in paragraph VII. of these findings of fact and the promissory notes thereby secured; that in the negotiations antecedent to the sale by the complainants to the defendant, R. C. Bell, of said land and timber, James D. Lacey & Company of Portland, Multnomah County, Oregon, acted as the agents and representatives of the complainants, and as a matter of inducement to the purchase by defendant, R. C. Bell,

and to induce said defendant to purchase the same, said James D. Lacey & Company represented to the defendant, R. C. Bell, that there was on said property as shown by said cruise, exclusive of hemlock, 11,584,000 feet board measure of good and merchantable timber; that the defendant, R. C. Bell, accepted said representation as the representation of the owner of the property, believed the same and purchased the property and executed the promissory note and mortgage in reliance upon said representation, and would not have purchased said property nor executed said promissory note and mortgage if such representation had not been made and if he had not believed the same; that thereafter the defendant, R. C. Bell, proceeded to remove timber from the above described land by careful, workmanlike and lumberlike methods, and has kept accurate and complete record of all merchantable timber cut from said premises, and the total of said cut and the total amount of merchantable timber on said premises at the time of said sale was less than 8,000,000 feet, to-wit: 7,916,999 feet of merchantable fir, cedar and spruce and of all merchantable timber exclusive of hemlock; that the representatives of the complainants at the time of the sale of the land and timber described in the complaint made by and through their authorized representatives and agents, James D. Lacey & Company, were false, untrue and fraudulent and known by the said James D. Lacey & Company, acting as agent and representative of the complainants as owners of said property to be false and untrue; that the defendant, R. C.

Bell, has been damaged thereby in the sum of $9,167.57.

3. The defendants object and except to finding of fact number X, for the reason that the same is not founded upon the evidence in the above entitled suit, and move the court to substitute therefor the following:

X.

"That there was included in the conveyance by the complainants to defendant, R. C. Bell, the following property:

All of the timber standing, growing, lying and being on the SE¼ of the SE¼ of Section 24, Township 10 North of Range 8 West of Willamette Meridian, together with the right to remove said timber at any time within twenty years from the 8th day of August, 1906; that said property was included in the purchase money mortgage described in paragraph VII. of these findings of fact; that neither at the time of execution of said deed nor at any time did the complainants have any right, title or interest in or to the property described in the preceding paragraph, nor any right to convey the same, nor did the said conveyance vest in said R. C. Bell any right, title or interest in or to said timber; that the defendant, R. C. Bell, has not been able to cut or remove any of the said timber by reason of such failure of title; that there is timber standing, growing, lying and being on said SE¼ of the SE¼ of Section 24, Township 10 North of Range 8 West of Willamette Meridian, to the extent of 260,000 feet; that the defendant, R. C. Bell, has been injured and damaged by fail-

ure of the complainants to convey title to said timber in the sum of $650; that the agreement of indemnity referred to and described in the amended reply of the complainants herein was executed as and is an additional security and indemnity to the defendants herein, and that the defendants are not estopped or barred by the execution or acceptance of said agreement from claiming damages in this suit against the complainants by reason of the execution and delivery of such agreement of indemnity.

4. The defendants object and except to all of the conclusions of law, and move the court to substitute therefor the following:

I.

That the defendant, R. C. Bell, is entitled to a decree that he have and recover of and from the defendants the sum of $9167.57, less such sum as shall be found due upon the promissory note described in paragraph IV. of the findings of fact.

. . . . . .

Attorneys for Defendants.

"Filed in the U. S. District Court, Western District of Washington, Southern Division, June 25, 1914. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy."

Decree.

This case came on to be heard at this term and was argued by counsel, and thereupon, upon consideration thereof,

IT WAS ORDERED ADJUDGED AND DECREED as follows, to-wit:

I.

That complainants have and recover of and from the defendant, R. C. Bell, and American Surety Company of New York, a corporation, duly incorporated, organized and existing under and by virtue of the laws of the State of New York for the purpose of engaging in the surety business, and by compliance with the laws of the United States and the State of Washington authorized to engage in the surety business in the State of Washington, and each of them, the sum of Five Thousand Six Hundred Twenty-five Dollars ($5,625.00), with interest thereon at the contract rate of six per cent per annum from April 22, 1912, less a credit of One Hundred Twenty and 93-100 Dollars ($120.93) on account of interest paid May 26, 1913, amounting, both principal and interest to Six Thousand Two Hundred Forty and 95-100 Dollars ($6-240.95), and the further sum of Five Hundred Dollars ($500.00) attorney's fees, and their costs and disbursements in this suit incurred, taxed and allowed at Two Hundred and Thirty-four and 40-100 Dollars ($234.40), and that execution issue therefor.

II.

That that certain mortgage executed and delivered by R. C. Bell and Mary A. Bell, his wife, to Mary E. C. Morley and Fred Morley, her husband, bearing date the 22nd day of April, 1912, and recorded in Volume I., pages 88 to 90 inclusive of the Records of Mortgages of the County of Wahkiakum, State

of Washington, given to secure a note dated April 22, 1912, in the sum of Five Thousand Six Hundred and Twenty-five Dollars (5625), due on or before twelve months after date with interest at the rate of six per cent per annum, payable to Mary E. C. Morley and Fred Morley and signed by R. C. Bell, is a first lien on the following described real property; situated in Wahkiakum County, State of Washington:

(a) Lots two (2), three (3) and four (4), and the southeast quarter of the northwest quarter, and the east half of the southwest quarter, and the southeast quarter of section nineteen (19); the west half of the southwest quarter of section twenty (20); and the northwest quarter of the northwest quarter of section twenty-nine (29); all in township ten (10) north, range seven (7) west of the Willamette Meridian;

(b) Also all the timber standing, growing, lying and being on the southeast quarter of the southeast quarter of section twenty-four (24); in township ten (10) north, range eight (8) west of the Willamette Meridian; together with the right to remove said timber at any time within twenty (20) years from the eighth day of August, 1906, and together with the right to build, operate and maintain railroads, skidroads, telephone lines, or other devices, over and across said described land and necessary or convenient to remove said timber therefrom.

(c) Also that certain right of way conveyed by G. K. Durrah and Clara Durrah, his wife, under date of January 15th, 1912, for fifteen (15) years, in language following, to-wit:

"A right of way twelve feet wide, over our land for a railroad, commencing about five hundred feet above the County Road on bank of Grays River, running from this starting point and curving until a straight line can be had along the fence; thence straight up the fence line, until the point of crossing the County Road into the lands of W. C. Kessell is reached, at which point a suitable curve will have to be made to make the County Road crossing. We also grant the privilege of using the river bank as a roll way."

(d) Also a right of way granted by W. C. Kessell and Mary Kessell, his wife, under date of January 15th, 1912, for ten (10) years, in language following, to-wit:

"A right of way for a railroad over our land, situated near Grays River, Washington. Width of right of way over said ground fifteen feet. Work shall begin within sixty days from date of this lease. The grantee may go over any portion of the land desired, and agrees to remove any gravel that may be used for a roadbed through the hay field."

(e) Also a right of way granted by Jacob W. Haynes and L. C. Haynes, his wife, under date of January 16th, 1912, for ten (10) years, in language following, to-wit:

"A right of way for a logging railroad over the following described land: SW¼ of the NE¼ of section 19, T. 10, R. 7. Work to start within sixty days from date. Logging road to follow left hand side along foot hill."

together with the tenements, hereditaments and appurtenances thereto belonging or in anywise ap-

pertaining; and that it be and the same is hereby foreclosed, and the whole of the real property therein described be sold as provided by law, and that the proceeds of such sale be applied:

1. To the costs and expenses of such sale;

2. To the costs and disbursements incurred by complainants in this suit;

3. To the payment of attorney's fees allowed complainants by the Court;

4. To the payment of the sum found to be due the complainants herein, Mary E. C. Morley and Fred Morley her husband, on said note.

III.

That the balance of the proceeds, if any, arising from such sale after the payment of the several sums of money hereinbefore specified in paragraph II. of this decree, be paid to the defendants, R. C. Bell and Mary A. Bell.

IV.

That if the proceeds arising from such sale be insufficient to pay the costs of said sale, the costs and disbursements of the complainants, and the attorney's fees allowed complainants by the Court, together with the amount of the principal and interest found to be due complainants on said note, the Clerk of the above entitled court is ordered to docket a judgment against said defendant, R. C. Bell, and American Surety Company of New York, a corporation, duly incorporated, organized and existing under and by virtue of the laws of the State of New York for the purpose of engaging in the surety business, and by compliance with the

laws of the United States and the State of Washington authorized to engage in the surety business in the State of Washington, and each of them, for such deficiency, and that execution issue therefor.

V.

That on the sale of said property all the right, title and interest that the defendants, R. C. Bell and Mary A. Bell, his wife, had in or to the same at the date of the execution of the aforesaid note and mortgage to the complainants, to-wit, April 22, 1912, or that they have subsequently acquired therein or thereto, be sold, and that said defendants and all persons claiming by, through, from or under them, be forever barred and foreclosed of and from any and all claims, liens, estate, right, title or interest, at law or in equity, in or to said property hereinbefore described or any part thereof.

VI.

That execution issue on the request of the said complainants, Mary E. C. Morley and Fred Morley, her husband, or either of them.

VII.

That at the sale of said real property the said Mary E. C. Morley and Fred Morley, her husband, or either of them, may become a bidder therefor, and may purchase the same if he be the highest bidder.

VIII.

That the United States Marshal for the Western District of Washington let the purchaser under

said execution sale into the possession of said real property and the whole thereof, so purchased.

Dated this 22nd day of June, 1914.

EDWARD E. CUSHMAN,
Judge.

"Filed in the U. S. District Court, Western District of Washington, Southern Division, June 22, 1914, FRANK L. CROSBY, Clerk; By F. M. Harshberger, Deputy."

Petition for Appeal and Allowance.

The above named defendants, R. C. Bell and Mary A. Bell and American Surety Company of New York, a corporation, feeling themselves aggrieved by the decree entered in the above entitled Court and cause on the 27th day of June, 1914, do hereby appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth and specified in the assignment of errors, which is filed herewith, and they pray that an appeal be allowed, and that citation issue, as provided by law, and that a transcript of the records and proceedings, upon which said decree was based, duly authenticated, be sent to the said United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioners further pray that a proper order touching the security to be required of them to perfect their appeal be made.

KOLLOCK & ZOLLINGER,
Solicitors for Defendants R. C. Bell and Mary A. Bell and American Surety Company of New York.

Order Granting Petition for Appeal and Fixing Amount of Bond.

The foregoing petition is hereby granted and the appeal is hereby allowed this 12th day of December, 1914, and the bond on appeal is hereby fixed at the sum of Five hundred dollars.

EDWARD E. CUSHMAN, Judge.

(Endorsed):

"FILED IN THE
U. S. DISTRICT COURT
Western Dist. of Washington,
Southern Division,
DEC. 10, 1914.
FRANK L. CROSBY, Clerk,
By E. C. Ellington, Deputy."

Assignment of Errors.

Come now the defendants, R. C. Bell and Mary A. Bell and the American Surety Company of New York, a corporation, and say that in the decree herein made and entered there is manifest error, and file the following assignment of errors committed and happening in the said cause upon which they will rely in their appeal from said decree:

I.

The United States District Court for the Western District of Washington, Southern Division, erred in rendering and entering a decree herein in favor of the complainants and against the defendants and the American Surety Company of New York, a corporation.

II.

That the Court erred in overruling and denying

the defendants' objections and exceptions to plaintiffs' proposed findings of fact and conclusions of law, and the whole thereof.

III.

That the Court erred in refusing, overruling and denying the defendants' proposed findings of fact and conclusions of law tendered to the Court.

IV.

That the Court erred in refusing to sign and file as findings of the Court, the defendants' proposed findings of fact and conclusions of law.

V.

That the Court erred in signing and filing the plaintiffs' proposed findings of fact and conclusions of law over the objections and exceptions of the defendants.

VI.

That the Court erred in making, signing and filing its finding of fact No. VIII. for the reason that the same is not complete, is not founded on or supported by the evidence and is not within the issues of this suit.

VII.

That the Court erred in making, signing and filing its finding of fact No. IX. for the reason that the same is not sustaining or supported by the evidence.

VIII.

That the Court erred in making, signing and filing its finding of fact No. X. for the reason that the same is not founded on or supported by the evidence.

IX.

That the Court erred in making, signing and filing its conclusion of law No. I.

X.

That the Court erred in making, signing and filing its conclusion of law No. II.

XI.

That the Court erred in making, signing and filing its conclusion of law No. III.

XII.

That the Court erred in making, signing and filing its conclusion of law No. IV.

XIII.

That the Court erred in not making, signing and filing defendants' proposed findings of fact No. VIII.

XIV.

That the Court erred in not making, signing and filing defendants' proposed finding of fact No. IX.

XV.

That the Court erred in not making, signing and filing defendants' proposed finding of fact No. X.

XVI.

That the Court erred in not making, signing and filing defendants' proposed conclusion of law No. I.

XVII.

That the Court erred in not rendering and entering a decree herein in favor of the defendants and against the complainants.

WHEREFORE, said defendants, R. C. Bell and Mary A. Bell, and American Surety Company of New York, a corporation, pray that said decree of

said United States District Court for the Western District of Washington, Southern Division, be reversed and set aside and a decree and judgment entered herein in favor of said defendants, R. C. Bell and Mary A. Bell and against the complainants, Mary E. C. Morley and Fred Morley.

KOLLOCK & ZOLLINGER,

Solicitors for defendants and American Surety Company of New York.

(Endorsed):

"FILED IN THE
U. S. DISTRICT COURT
Western Dist. of Washington,
Southern Division,
DEC. 10, 1914.
FRANK L. CROSBY, Clerk,
By E. C. Ellington, Deputy."

Undertaking on Appeal.

KNOW ALL MEN BY THESE PRESENTS, That we, R. C. Bell and Mary A. Bell, as principals, and the American Surety Company of New York, a surety, are held and firmly bound unto the above named Mary E. C. Morley and Fred Morley in the sum of Five Hundred Dollars ($500.00), for the payment of which, well and truly to be made, we bind ourselves jointly and severally, and each of our heirs, executors, administrators, successors and assigns firmly by these presents.

Sealed with our seals and dated this 11th day of December, 1914.

WHEREAS, the above named defendants and American Surety Company of New York have

prosecuted an appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, to reverse a decree rendered and entered in the above entitled cause in the United States District Court for the Western District of Washington, Southern Division, on the 27th day of June, 1914:

NOW, THEREFORE, the condition of this obligation is such that the above named defendants, R. C. Bell and Mary A. Bell, and American Surety Company of New York, shall prosecute their said appeal to effect, and shall answer all damages and costs that may be awarded against them, if they fail to make good their plea, then the above obligation to be void; otherwise to remain in full force and virtue.

R. C. BELL (Seal)
MARY A. BELL (Seal)

AMERICAN SURETY COMPANY of New York,
(Seal of Surety Co.) By W. P. Lyons,
Resident Vice-President.

Attest: By W. A. King, Resident Ass't. Secretary.
W. A. KING, Agent.

Order Approving Bond.

The above and foregoing Cost Bond is hereby approved this 15th day of December, 1914.

EDWARD E. CUSHMAN,
United States District Judge.

(Endorsed):

"FILED IN THE
U. S. DISTRICT COURT
Western Dist. of Washington,
Southern Division,
DEC. 15, 1914.
FRANK L. CROSBY, Clerk,
By F. M. Harshberger, Deputy."

Stipulation (as to Original Exhibits).

It is hereby stipulated by and between the attorneys for the plaintiffs and defendants that the original exhibits, as introduced in evidence, may be transmitted to the Circuit Court of Appeals and incorporated in the record on appeal without printing, and when so certified shall have the same effect as if formally printed in the record, and they may be referred to by either party in briefs or on printed argument.

PLATT & PLATT,
Attorneys for Plaintiffs.
KOLLOCK & ZOLLINGER,
Attorneys for Defendants.

(Endorsed):

"FILED IN THE
U. S. DISTRICT COURT
Western Dist. of Washington,
Southern Division,
JAN. 12, 1915.
FRANK L. CROSBY, Clerk,
By E. C. Ellington, Deputy."

Clerk's Certificate.

UNITED STATES OF AMERICA,
WESTERN
DISTRICT OF WASHINGTON. } ss.

I, FRANK L. CROSBY, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the above entitled cause as the same appears of record and on file in my office in said district at Tacoma, and that the same is made pursuant to praecipe of counsel filed herein.

I further certify that I hereto attach and herewith transmit the original citation and original order extending time for filing record on appeal, also original exhibits.

I further certify that the following is a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by and on behalf of the appellants, for making record, certificates or return to the United States Circuit Court

of Appeals for the Ninth Circuit, in the above entitled cause, to-wit:

Clerk's fees (Sec. 828 R. S. U. S.) for making record, certificate or return, 377 folios at 15c ..... $.56.55

Certificate of Clerk to transcript of record, 3 folios at 15c ..... .45

Seal to said certificate ..... .20

Statement of the cost of printing said transcript, collected and paid by attorneys for appellants 161.00

ATTEST my hand and the seal of the said Court, at Tacoma, in said district, this 17th day of February, A. D. 1915.

(Seal)

FRANK L. CROSBY, Clerk.
By E. C. Ellington, Deputy Clerk.